



BOULT • CUMMINGS
CONNERS • BERRY PLC

Henry Walker
(615) 252-2363
Fax (615) 252-6363
Email hwalker@boultcummings.com

July 9, 2002

The Honorable Sara Kyle
Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: *Petition for Interconnection by Cinergy Communications Company
Against BellSouth Telecommunications, Inc.*
Docket No 01-00987

Dear Chairman Kyle:

Enclosed are the original and thirteen copies of the Rebuttal Testimonies of Pat Heck and Charles Frangos to be filed on behalf of Cinergy Communications, Inc. in the above-captioned proceeding.

Very truly yours,

By

Henry Walker
Bolt, Cummings, Conners & Berry, PLC
414 Union St., Suite 1600
Nashville, TN 37219

Counsel for Cinergy Communications, Inc

HW/nl
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

Re: *Petition for Interconnection by Cinergy*)
Communications Company for Arbitration of an)
Interconnection Agreement with BellSouth)
Telecommunications, Inc. Pursuant to the)
Telecommunications Act of 1996)
)
)

Docket No. 01-00987

REBUTTAL TESTIMONY OF PAT HECK ON BEHALF OF CINERGY
COMMUNICATIONS, INC.

Dated: July 9, 2002

1 **Q. What is your name please?**

2 A. My name is Patrick Heck.

3 **Q. Mr. Heck, have you previously provided testimony in this case?**

4 A. Yes, I have.

5 **Q. Did you have an opportunity to review the testimony of the witnesses**
6 **for BellSouth Telecommunications, Cynthia K. Cox, Thomas G.**
7 **Williams and Keith Milner?**

8 A. Yes, I did review the testimony of these three individuals and I find much
9 of their testimony inaccurate and problematic. I would like to take this
10 opportunity to rebut the testimony of these witnesses I will start with Ms.
11 Cox and simply follow her testimony and point out Cnergy
12 Communication Company (Cnergy)'s position on each issue There may
13 be times that I digress in order to explain an issue, but I will come back to
14 the primary issue Thereafter, I will do the same with Mr. Williams' and
15 Mr. Milner's testimony

16 **Q. Do you disagree with the following statement of Ms. Cox beginning at**
17 **page 4, line 13 of her testimony: "The FCC concluded that, except in**
18 **'one limited exception,' which I will discuss below, CLECs are not**
19 **impaired without access to unbundled packet switching."**

20 A. I disagree with that statement The FCC did create one *national* test for
21 determining when the incumbent LEC would be required to unbundle
22 packet switching and that test is set forth in 47 CFR 51.319(c)(5).

1 However, the remainder of that statement is absolutely incorrect. In the
2 UNE Remand Order, the FCC specifically defined an unbundled packet
3 switching element¹ Then, the FCC determined that competing carriers
4 were impaired without access to the unbundled packet switching element.²
5 The FCC decided not to add unbundled packet switching to the national
6 list, but that decision was made for market reasons and not because
7 CLECs are not impaired without access to the unbundled element as
8 asserted by Ms. Cox:

9 We decline at this time to unbundle packet switching functionality,
10 except in limited circumstances. Among other potential factors,
11 we recognize that the presence of multiple requesting carriers
12 providing service with their own packet switches is probative of
13 whether they are impaired without access to unbundled packet
14 switching. The record demonstrates that competitors are actively
15 deploying facilities used to provide advanced services to serve
16 certain segments of the market – namely, medium and large
17 business – and hence they cannot be said to be impaired in their
18 ability to offer service, at least to these segments without access to
19 the incumbent's facilities. In other segments of the market,
20 namely, residential and small business, we conclude that
21 competitors may be impaired in their ability to offer service
22 without access to incumbent LEC facilities due, in part, to the cost

¹ “We define packet switching as the function of routing individual data units, or “packets,” based on address or other routing information contained in the packets. Because packet switching and DSLAMs are used to provide telecommunications services, packet switching qualifies as a network element.” *Implementation of the Local Competition Provision of the Telecommunications Act of 1996, CC Docket No 96-98, Third Report and Order*, 15 FCC Rcd 3696, ¶304 (1999) (“UNE Remand Order”)

² “We see no reason to distinguish a requesting carrier’s collocation-related costs and delays to provide circuit-switched service from those collocation costs and delays incurred by requesting carriers to provide packet-switched services. These costs and delays lead us to find that competitors are impaired in their ability to offer advanced services without access to incumbent LEC facilities.” *Implementation of the Local Competition Provision of the Telecommunications Act of 1996, CC Docket No 96-98, Third Report and Order*, 15 FCC Rcd 3696, ¶309 (1999) (“UNE Remand Order”)

1 and delay of obtaining collocation in every central office where the
2 requesting carrier provides service using unbundled loops.
3 [emphasis added] We conclude, however, that given the nascent
4 nature of the advanced services marketplace, we will not order
5 unbundling of packet switching functionality as a general matter.³
6

7 The FCC went on to explicitly point out that state commissions could
8 order the unbundling of packet switching on a state-by-state basis. The
9 FCC as much as invited Cnergy to make a request for unbundling of the
10 packet switching network element in Tennessee when it stated that a
11 CLEC is “free to demonstrate to a state commission that lack of unbundled
12 access to the incumbent’s [packet switching] network element impairs
13 their ability to provide the services they seeks [sic] to offer. A state
14 commission is empowered to require incumbent LECs to unbundle
15 specific network elements used to provide [packet switching], consistent
16 with the principles set forth in this order.”⁴
17

18 Therefore, it is incorrect to say that the FCC determined that CLECs are
19 not impaired without access to unbundled packet switching. It is actually
20 more correct to say that the FCC found that CLECs are impaired without
21 access to unbundled packet switching, but left it up to the states to order

³ *Implementation of the Local Competition Provision of the Telecommunications Act of 1996, CC Docket No 96-98, Third Report and Order, 15 FCC Rcd 3696, ¶306 (1999) (“UNE Remand Order”)*

⁴ *Implementation of the Local Competition Provision of the Telecommunications Act of 1996, CC Docket No 96-98, Third Report and Order, 15 FCC Rcd 3696, ¶312 (1999) (“UNE Remand Order”)*

1 the unbundling on a case-by-case basis when a proper showing of
2 impairment was made, such as was done by Cinergy in this case.

3
4 Recently, the U.S. Court of Appeals for the District of Columbia
5 remanded the FCC's rules for unbundling back to the FCC for further
6 consideration. The D.C. Circuit's main assertion in that case was that the
7 Supreme Court required a "more nuanced concept of impairment" and one
8 that looked at "specific markets or market categories."⁵ The D.C. Circuit
9 did not substitute its own definition of impairment to guide state
10 commissions, nor did the decision's ordering clause vacate the current
11 rules. Immediately following this decision, the FCC issued a statement
12 indicating that its current rules remain in effect until new rules can be
13 considered in the pending Triennial Review.⁶ For purposes of this
14 arbitration, the Authority should decide the issue of Cinergy's impairment
15 under the current rules taking into consideration the specific markets of
16 small business and residential customers in the specific market of
17 Tennessee BellSouth territory as it exists in July of 2002, consistent with a
18 granular and market-specific approach to unbundling.

19

⁵ United States Telecom Association v. FCC, ____ F.3d ____ (C.A.D.C. 2002) (page 12 of the advanced version printed from <http://pacer.cadc.uscourts.gov/common/opinions/200205/00-1012a.txt>)

⁶ Statement of FCC Chairman Michael Powell on the Decision by the Court of Appeals for the District of Columbia Regarding the Commission's Unbundling Rules, FCC News Release, May 24, 2002

1 Therefore, the Authority should not confine itself to the national
2 unbundling analysis made by the FCC in 1999. Instead, the Authority
3 must evaluate the relevant markets taking into consideration the totality of
4 the circumstances, as required by the FCC, to determine whether or not
5 Cinergy is impaired in its ability to provide service due to its lack of last
6 mile broadband access. This analysis includes not only the current status
7 of actual facilities deployment in Tennessee, but also the effect on the
8 financial markets caused by the numerous bankruptcies in the telecom
9 sector as well as the collapse of investor confidence caused by the
10 numerous stories of accounting fraud

11

12 **Q. Ms. Cox states on page 7 beginning at line 14, “the FCC**
13 **acknowledged that the advanced services market is competitive, and it**
14 **recognized that forcing ILECs to unbundle equipment used to provide**
15 **competitive advanced services would only impede further**
16 **development of competition.” Do you have any comment regarding**
17 **this statement?**

18 **A. Ms. Cox relies upon the FCC’s understanding of the advanced service**
19 **market as it existed in the fall of 1999. Now, almost three years later, the**
20 **competitive landscape is incredibly different from the dynamic and**
21 **optimistic market examined by the FCC in 1999**

- 1 • Rhythms, NorthPoint, and Covad which were the basis for the FCC's
2 impression of a competitive market have all declared bankruptcy.
- 3 • Covad has emerged from bankruptcy but has pulled back service to
4 only the top 94 MSAs in the country. It certainly isn't the competitor it
5 once was.
- 6 • The Sprint ION project was an emerging competitor in the broadband
7 market. However, last year the project was cancelled and Sprint had to
8 write off a loss of \$1 8 billion
- 9 • Almost every day, it seems, there is news of another
10 telecommunications company going bankrupt. Tennessee has already
11 experienced numerous financial failures in the telecom arena. The list
12 of companies serving Tennessee who have declared bankruptcy in the
13 last couple of years includes Adelphia Business Solutions, Ardent
14 Communications, Excite@Home, Covad Communications,
15 360Networks USA, Teligent, Viatel, e.spire Communications, WinStar
16 Communications, XO Communications, Global Crossing, Digital
17 Teleport, Lightyear Communications, Williams Communications, ICG
18 Communications, and ConnectSouth just to name a few.⁷ And it now
19 appears that WorldCom may not be far behind
- 20 • Scott Cleland, a telecom industry analyst with the Precursor Group in
21 Washington, D C. has been widely quoted recently saying that 24 of

⁷ Compiled from various news sources including Miller & Van Eaton, P L L C website
(http://www.millervaneaton.com/hot_april3_c.htm)

1 the country's 29 major publicly traded telecom companies are at risk
2 of bankruptcy in the next year

3 It is disingenuous of BellSouth to rely on a statement that is no longer
4 supported by fact. In fact, the stark contrast between the facts upon which
5 the FCC's decision not to unbundle packet switching were based and the
6 current situation highlights the need for Cenergy to obtain access to
7 unbundled packet switching so that Tennessee has a strong competitor that
8 is able to build facilities in the future. Under the totality of the
9 circumstances approach developed by the FCC, the Authority must
10 determine impairment based upon the market as it exists today in the midst
11 of the telecom meltdown.

12

13 Moreover, this Authority has already rejected the position asserted by Ms.
14 Cox. In Docket 00-00544 the Authority ordered BellSouth to install, **for**
15 **CLEC's use**, dual-purpose line cards in the fiber-fed Next Generation
16 DLC equipment in the remote terminal and that such installation of line
17 cards should be allowed under nondiscriminatory terms and at just and
18 reasonable rates.⁸

19

20 In response to BellSouth's request for a Stay of this Order, the Authority
21 determined that "CLECs will be harmed if an indefinite stay is granted and

1 they are prevented from offering xDSL-based services to Tennessee
2 customers because BellSouth will not place dual-purpose line cards in the
3 fiber-fed NGDLC equipment. Even though collocation of DSLAMs in the
4 remote terminals offers an alternative to CLECs, this alternative is more
5 **costly** and will not be uniformly available in every remote terminal.”
6 (emphasis added).

7
8 This Authority has recognized that last mile broadband access is essential
9 for telecommunications now and in the future. Cinergy needs this
10 broadband access to deliver VoBB. The fact is that BellSouth wants to
11 deny CLECs access to last mile broadband access altogether so that it can
12 regain a monopoly over local voice by squeezing out competition.

13
14 **Q. On page 3 of her testimony, Ms. Cox states “While a State commission**
15 **may create additional UNEs beyond the FCC’s national list, in order**
16 **to do so it must find that a CLEC is impaired in its ability to offer**
17 **services without access to the network function on an unbundled**
18 **basis.” Do you agree with Ms. Cox?**

19 **A Yes.**

20

⁸ *In Re Generic Docket to Establish UNE Prices for Line Sharing Per FCC 99-355, and Riser Cable and Terminating Wire as Ordered in TRA Docket 98-00123, Docket No 00-00544, First Interim Order, p 42 (Apr 3, 2002)*

1 **Q. Has Cinergy met the impairment standard?**

2 A. Yes. The FCC has already determined that CLECs are impaired without
3 access to unbundled packet switching: “These costs and delays lead us to
4 find that competitors are impaired in their ability to offer advanced
5 services without access to incumbent LEC facilities.”⁹ Although this
6 Authority may rely on the FCC and does not need to make a further
7 finding of impairment, Cinergy has presented a factual record establishing
8 an impairment. Although BellSouth never lists them, it appears that
9 BellSouth is claiming that Cinergy has four options for reaching its
10 customers. These options are.

- 11 1. Self-provisioning – use BellSouth UNEs and Cinergy-provided
12 DSLAMs collocated in Central Offices and remote terminals.
13 2. Purchase packet switching from another entity or partner with
14 another entity
15 3. Purchase BellSouth’s federally tariffed packet switching
16 service.
17 4. Use BellSouth’s FastAccess ADSL service over resold lines.

18 The first option, Self-Provisioning, is covered extensively below in my
19 rebuttal of Mr. Milner’s testimony. I won’t repeat myself here except to

⁹ *Implementation of the Local Competition Provision of the Telecommunications Act of 1996, CC Docket No 96-98, Third Report and Order*, 15 FCC Rcd 3696, ¶309 (1999) (“UNE Remand Order”)

1 say that the facts presented establish that Cinergy is clearly impaired
2 when considering self-provisioning
3

4 The second option is to purchase packet switching from another entity or
5 partner with another entity. This is a non-existent option. In order to
6 refute this point, BellSouth only needs to point out a willing partner or
7 series of partners who can provide DLEC services at a fair price and
8 provide reasonable, competitive coverage in the BellSouth service areas.
9 We haven't been able to find a partner that will even offer DLEC services
10 at an *unfair* price. Of course, there is a good reason why we won't find a
11 partner DLEC – there isn't a viable business case for that service.
12 BellSouth has itself admitted that a speculative build-out of stand-alone
13 DSL (exactly the business DLECs are in) makes little economic sense:

14 Stand-alone broadband is costly and risky. In assessing the
15 viability of providing DSL over UNE-P, BellSouth determined that
16 the additional operational costs associated with implementation
17 along with the reduced profitability of stand-alone DSL, made the
18 opportunity extremely unattractive.¹⁰
19

20 The third option is to use BellSouth's wholesale ADSL product. My direct
21 testimony clearly shows that this option is not financially viable –
22 principally because of BellSouth's monopolistic line requirements
23 (specifically that the underlying voice line be either be a BellSouth facility

¹⁰ Rebuttal Testimony of Cynthia K. Cox before the Kentucky Public Service Commission Case No. 2001-432, March 21, 2002, p. 19

1 line or a line provisioned under resale). Furthermore, BellSouth's federal
2 tariff specifically limits use of the wholesale product to data services –
3 effectively preventing Cnergy from using it to deliver VoBB ¹¹

4
5 The fourth option is similar to the third – use BellSouth's FastAccess
6 Internet service over resold lines. Again, the line must be provisioned on
7 resale and all of the arguments covering the third option apply here as
8 well. So there you have it in a nutshell – there are four options and all of
9 these options are financial losers. The only conclusion is that Cnergy is
10 undeniably impaired.

11
12 **Q. Do you disagree with Ms. Cox's characterization of the Authority's**
13 **position on the issue of unbundled packet switching beginning at page**
14 **10 of her testimony?**

15 A I disagree with both points raised. First, Ms. Cox raises the Intermedia
16 Arbitration case, Docket No. 99-00948. In that case, the Authority found
17 that it had authority to order unbundled packet switching, but based upon
18 the facts presented determined that "Intermedia failed to demonstrate it
19 would be impaired without access to unbundled packet switching

¹¹ See BellSouth FCC Tariff No. 1, Section 7.2.17(A) (Effective October 6, 2001) "BellSouth ADSL service is intended as an industrial offering that is made available to Network Service Providers for provision of high speed **data service** to their customers." (emphasis added) VoBB is a telecommunications service and BellSouth could use the tariff language to deny Cnergy DSL access for VoBB

1 capabilities”¹² Cnergy has presented unique facts establishing that it is
2 impaired in the small business and residential markets from providing
3 VoBB without unbundled packet switching. The issue of VoBB was not
4 raised by Intermedia. This is a case of first impression for the Authority
5 and Cnergy is not limited by the facts of the Intermedia Arbitration

6
7 Secondly, Ms. Cox refers to a statement from the Director’s Conference of
8 May 21, 2002, as indicating that the authority rejected unbundled packet
9 switching This is a blatant attempt to mislead the Authority. The
10 Authority recently released its Order on Petition For Stay of Requests For
11 Consideration And Clarification on June 27, 2002. This Order speaks for
12 itself, but it certainly does not reject the concept of unbundled packet
13 switching as a UNE

14
15 On April 3, 2002, the Authority issued the First Initial Order in Docket 00-
16 00544 requiring BellSouth to install, for the CLECs’ use, dual-purpose
17 line cards in the fiber-fed Next Generation DLC equipment in the remote
18 terminal The Order also required BellSouth to provide CLECs access
19 under nondiscriminatory terms and at just and reasonable rates.

¹² *In Re Petition For Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc and Intermedia Communications, Inc Pursuant to Section 252(B) of the Telecommunications Act of 1996, Order of June 25, 2001*, p 35

1 Essentially, the Authority ordered unbundled packet switching from the
2 remote terminal to the central office where there is fiber in the loop.¹³

3
4 BellSouth requested a stay of the Authority's April 3, 2002 Order alleging
5 technical, logistical and operational issues with all NGDLC dual purpose
6 line card solutions currently available. Covad opposed the motion for stay
7 and also requested access to unbundled packet switching. The Authority
8 found that the issue of unbundled packet switching was a new issue that
9 had not been previously addressed by the Authority. The Authority ruled
10 on procedural grounds that Covad had not raised the issue appropriately,
11 but that "Covad could still raise this issue either in later phases of [that]
12 proceeding or in another proceeding."¹⁴ Therefore, contrary to Ms. Cox's
13 assertion, the Authority has never addressed the issue of unbundled packet
14 switching as a UNE. However, the Authority did indicate a willingness to
15 address the issue if raised in a proper manner. Cinergy is presenting the
16 Authority the opportunity to now consider unbundled packet switching in
17 a unique context.

¹³ Cinergy's request is to have unbundled packet switching in a UNE that includes transport. Cinergy is requesting a single point of interconnection to BellSouth's ATM network in each LATA. This is precisely how BellSouth provides its FCC tariffed wholesale ADSL interstate access product. There is no reason a UNE could not be provisioned in the same manner. The only difference would be that the UNE would be priced using TELRIC as opposed to wholesale rates.

¹⁴ *In Re Generic Docket to Establish Une Prices For Line Sharing Per FCC 99-355, and Riser Cable and Terminating Wire as Ordered in TRA Docket 98-00123, Order on Petition For Stay and Requests For Reconsideration and Clarification*, Docket No. 00-00544, p. 7 (June 27, 2002).

1 Cenergy is requesting the Authority to consider whether it is impaired
2 without access to unbundled packet switching to provide VoBB to the
3 small business and residential markets of Tennessee. If so, the Authority
4 must unbundle packet switching Covad, unfortunately, did not present
5 sufficient evidence of impairment to satisfy the Authority and then raised
6 the issue at a procedurally inappropriate time. None of these deficiencies
7 are present in the pending arbitration.

8 **Q. Do you agree with the following statement from page 11 of Ms. Cox's**
9 **testimony? "CLECs will not have any incentive to invest in**
10 **equipment to provide advanced services if they can ride the backs of,**
11 **and shift investment to, the ILECs. Conversely, an ILEC's incentive**
12 **to invest in new and innovative equipment will be stifled if its**
13 **competitors, who can just as easily invest in the equipment, can take**
14 **advantage of the equipment's use without incurring any risk."**

15 **A.** Ms. Cox here raises an argument that the ILECs have collectively raised
16 all the way to the Supreme Court. This "free-ride" argument was
17 resoundingly rejected by the Supreme Court when it adopted TELRIC as
18 an appropriate pricing methodology for UNEs pursuant to the
19 Telecommunications Act of 1996. The Supreme Court held:

20 According to the incumbents, the result will be, not competition,
21 but a sort of parasitic free-riding, leaving TELRIC incapable of
22 stimulating the facilities-based competition intended by Congress
23 We think there are basically three answers to this no-stimulation
24 claim of unreasonableness (1) the TELRIC methodology does not
25 assume that the relevant markets are perfectly competitive, and the

1 scheme includes several features of inefficiency that undermine the
2 plausibility of the incumbents' no-stimulation argument; (2)
3 comparison of TELRIC with alternatives proposed by the
4 incumbents as more reasonable are plausibly answered by the
5 FCC's stated reasons to reject the alternatives; and (3) **actual**
6 **investment in competing facilities since the effective date of the**
7 **Act simply belies the no-stimulation argument's conclusion.**¹⁵
8

9 Therefore, the Authority should disregard BellSouth's arguments related
10 to CInergy receiving a free-ride. The Supreme Court has put this issue to
11 rest. There is no free ride because BellSouth is compensated at an
12 appropriate rate based upon TELRIC. Moreover, the Supreme Court
13 acknowledges that this approach encourages investment by competitors.
14 BellSouth should not be heard to make any further free-ride arguments.
15

16 In fact, the Supreme Court in Verizon reiterated that the
17 Telecommunications Act of 1996 outlines three (3) proscribed methods of
18 entry by competitors: facilities-based, resale and UNEs. Ms. Cox and
19 BellSouth would prefer that CInergy limit itself to resale or facilities-based
20 competition. However, the Supreme Court clearly laid all debate on this
21 matter to rest when it stated:

22 The 1996 Act both prohibits state and local regulation that impedes
23 the provision of "telecommunications service," §253(a), and obligates
24 incumbent carriers to allow competitors to enter their local markets,
25 §251(c). Section 251(c) addresses the practical difficulties of
26 fostering local competition by recognizing three strategies that a
27 potential competitor may pursue. First, a competitor entering the
28 market (a "requesting" carrier, §251(c)(2)), may decide to engage in

¹⁵ Verizon v. FCC, 535 U.S. ____ (2002), p. 32 of the slip opinion.

1 pure facilities-based competition, that is, to build its own network to
2 replace or supplement the network of the incumbent. If an entrant
3 takes this course, the Act obligates the incumbent to “interconnect”
4 the competitor’s facilities to its own network to whatever extent is
5 necessary to allow the competitor’s facilities to operate. §§251(a) and
6 (c)(2). At the other end of the spectrum, the statute permits an entrant
7 to skip construction and instead simply to buy and resell
8 “telecommunications service,” which the incumbent has a duty to sell
9 at wholesale. **Between these extremes, an entering competitor may**
10 **choose to lease certain of an incumbent’s “network elements,”**
11 **which the incumbent has a duty to provide “on an unbundled**
12 **basis” at terms that are “just, reasonable, and**
13 **nondiscriminatory.” §251(c)(3).¹⁶**

14
15 Therefore, since Cinergy has established it is impaired without unbundled
16 packet switching, the Authority can unbundle this UNE. As a UNE, it is
17 an appropriate method of competitive entry pursuant to the
18 Telecommunications Act of 1996. Also, it is appropriately priced at
19 TELRIC rates. Despite BellSouth’s many protestations to the contrary,
20 the Supreme Court has recognized Cinergy’s rights to access UNEs. The
21 Authority should not continue to allow BellSouth to limit competitive
22 entry only to resale and/or facilities-based competition.

23
24 I have attached as Exhibit PLH-R1 a copy of a paper entitled “Promoting
25 Broadband Investment and Avoiding Monopoly” written by Robert E.
26 Hall, Department of Economics and Hoover Institution, Stanford
27 University and William H. Lehr, Graduate School of Business, Columbia

¹⁶ Verizon v. FCC, 535 U.S. ____ (2002), p. 19 of the slip opinion

University. Messrs Hall and Lehr conclude that Bell investment increases with competition and decreases (and prices increase) without competition.

The [Telecommunication] Act's promise of access to Bell facilities attracted an influx of rivals in local service, both established long-distance carriers and new companies. As these rivals invested, the Bells *increased* their own investments. Further, the Bells invested in DSL service and promoted it. DSL services grew quite rapidly – as a result of investments and promotion by both the rivals and the Bells. The investments included subsidizing DSL modems and installation, as well as significant marketing costs. Recent disappointments in DSL are the result of the collapse of many of the new rivals, the subsequently higher prices charged by Bells once they no longer face competition, and because of the poor quality of service offered by the Bells which may have turned many would-be consumers away. The evidence supports the view that competition spurs Bell investment ¹⁷ (emphasis in original)

Further, Messrs Hall and Lehr point out that competition spurs investment not only in infrastructure but also in the general economy:

Mandatory access to last-mile circuits and other services, at appropriate rates, encourages investment all along the value chain. It encourages investment both upstream and downstream of the bottleneck because it assures all competitors that they will be able to purchase an essential input. The value of complementary investments upstream – Internet infrastructure and broadband content – and downstream – home networking and equipment – of the local access bottleneck is diminished by the threat of monopoly power over the bottleneck. It is monopoly power over the bottleneck that reduces incentives to invest.¹⁸

The model of unbundled network elements as set forth in the Telecommunications Act of 1996, and upheld by the United States

¹⁷ Robert E. Hall, Stanford University, and William H. Lehr, Columbia University and MIT Internet and Telecoms Convergence Consortium, *Promoting Broadband Investment and Avoiding Monopoly*, February 21, 2002, p. 8

¹⁸ *Id.* at p. 9

1 Supreme Court, is the economically appropriate incentive to investment
2 according to Messrs. Hall and Lehr:

3 If priced at long run incremental cost, the availability of unbundled
4 network access provides efficient investment incentives to both
5 entrants and the Bells. The entrants will lease facilities from the
6 Bell when that is more efficient (that is, when constructing
7 duplicate facilities would result in higher average total costs) and
8 will invest in their own facilities when that is warranted. If
9 unbundled access is priced too high, then entrants are, in most
10 cases, deterred from investing at all, or when they do invest, from
11 over-investing in their own facilities. Indeed, if there were a
12 competitive wholesale market in the various elements that
13 comprise a local access network, we should expect to see the prices
14 of these elements approaching the same price as the appropriate
15 regulated price. By contrast, in the absence of unbundled access at
16 a regulated price, the Bell would have an incentive to set the price
17 significantly above the economic cost in order to extract monopoly
18 profits from competitors, or even more likely, to deny access
19 altogether, thereby effectively eliminating the threat of
20 competition.¹⁹

21
22 The above-referenced investment by competitors and incumbents is
23 exactly what the Supreme Court envisioned when it made its ruling in
24 Verizon. Unbundling of packet switching would both make economic
25 sense and follow the Supreme Court's interpretation of the Act

26
27 BellSouth has followed an anticompetitive and monopolistic strategy in
28 order to maintain control of its bottleneck advantage with respect to
29 unbundled packet switching. In Tennessee, BellSouth has a monopoly
30 over ADSL. In order to maintain that advantage, BellSouth instituted a
31 policy whereby its ADSL may be sold only over BellSouth voice lines.

¹⁹ *Id* at pp 10-11

1 Competitors may provision over resale, but this limits profitability. Also,
2 it must be remembered that in a resale scenario BellSouth, and not
3 Cinergy, gets to keep the carrier access revenue received from IXC's for
4 originating and terminating access to the local voice customer. Therefore,
5 under BellSouth's policy not only are costs to the competitor higher, but
6 BellSouth also diverts a revenue stream to itself. This diversion of
7 revenue smacks of an abuse of monopoly power. BellSouth, by denying
8 its competitors access to packet switching of any kind, will eventually
9 drive competitors from the Tennessee market. BellSouth will then be free
10 to extract monopoly profits on both voice and Internet access by virtue of
11 its monopoly over access to the high-frequency portion of the loop. From
12 an economic perspective, unbundling of packet switching makes the most
13 sense.

14
15 BellSouth would prefer that Cinergy not have access to the UNEs it needs
16 to provide service to its clients because Cinergy will take market share
17 from BellSouth. However, if there is to be competition BellSouth must
18 lose some market share. It is a zero-sum game in which each customer
19 won by Cinergy will be a customer lost by BellSouth or another CLEC.
20 All of BellSouth's anticompetitive practices boil down to maintaining
21 market share. BellSouth will do anything it can to preserve its monopoly.
22 However, the Supreme Court has determined that the public policy

1 underpinning the Telecommunications Act of 1996 is to foster competition
2 at the expense of BellSouth's market share:

3 Under the local-competition provisions of the Act, Congress called
4 for ratemaking different from any historical practice, to achieve the
5 entirely new objective of uprooting the monopolies that traditional
6 rate-based methods had perpetuated . . . For the first time
7 Congress passed a ratesetting statute with the aim not just to
8 balance interests between sellers and buyers, but to reorganize
9 markets by rendering regulated utilities' monopolies vulnerable to
10 interlopers, even if that meant swallowing the traditional federal
11 reluctance to intrude into local telephone markets. The approach
12 was deliberate, through a hybrid jurisdictional scheme with the
13 FCC setting a basic, default methodology for use in setting rates
14 when carriers fail to agree, but leaving it to state utility
15 commissions to set the actual rates.²⁰

16
17 Because UNEs and TELRIC have been decided by the highest court in the
18 land to be appropriate under the law, to the extent the Authority finds that
19 Cinergy is impaired in its ability to provide VoBB to the small business
20 and residential markets in Tennessee, this Authority must order unbundled
21 packet switching as a UNE.

22

23

²⁰ Verizon v. FCC, 535 U.S. ____ (2002), pp. 15-16 of the slip opinion. The omitted portion quotes John Breaux and his interpretation of the goal of the Telecommunications Act as one acceptable to the Supreme Court: **"This is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out. . . . It is kind of almost a jump-start** I will do everything I have to let you into my business, because we used to be a bottleneck, we used to be a monopoly, we used to control everything. Now, this legislation says you will not control much of anything. You will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network that is at least equal in type, quality, and price to access [a] Bell operating company affords to itself" (edited in Supreme Court's opinion).

1 **Q.** Beginning at page 12 of her testimony, Ms. Cox discusses what she
2 refers to as the Advanced Services NPRM. What significance do these
3 FCC proceedings have to the arbitration between BellSouth and
4 Cinergy?

5 **A.** The Advanced Services NPRM should have no effect one way or the other
6 on Cinergy's ability to access unbundled packet switching as a UNE upon
7 a showing of impairment. Qwest recognized this in its Reply Comments
8 to the above-referenced NPRM when it stated:

9 ...CLECs can gain access to broadband-related UNEs used to
10 provide broadband transmission to ISPs, to the extent lack of
11 access to such UNEs would in fact impair the CLECs' provision of
12 services.²¹

13

14 In support of this position, Qwest cites to 47 U.S.C. § 251(d). That is
15 exactly the case Cinergy is now presenting before the Authority. Even
16 though BellSouth doesn't want to admit it, Qwest establishes that Cinergy
17 has the right to the packet switching UNE upon a showing of impairment
18 pursuant to the Telecommunications Act of 1996. As Qwest agrees, this
19 right endures irrespective of what the FCC may decide in its NPRM.

20

²¹ *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*,
CC Docket No. 02-33, *Reply Comments of Qwest Communications International, Inc.*, p. 26, July 1, 2002.

Moreover, the Telecommunications Act grants sole authority over interconnection agreements between CLECs and ILECs in Tennessee to the Tennessee Regulatory Authority 47 U.S.C 153(d)(3) provides:

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that – (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part

Therefore, if the TRA orders terms in an interconnection agreement consistent with 47 U.S.C. 153(d)(3), the FCC may not preclude the enforcement of that interconnection agreement.

Moreover, the Authority has no reason to believe that its decision to unbundle packet switching in the Interconnection Agreement between BellSouth and Cinergy would be challenged. The statement quoted by Ms. Cox indicates that the FCC is contemplating classifying “wireline broadband Internet access services” as information services subject to regulation under Title I of the Act. The NPRM contemplates only “Internet access” and does not address what classification should apply to utilization of the high frequency portion of the loop in order to provide local dial tone. Cinergy raised this issue in comments it filed with the FCC which I have attached hereto as Exhibit PLH-R2 Cinergy’s comments establish that VoBB is a telecommunications service and

unbundled packet switching should be available for unbundling to provide
this communications service (footnotes appear in the original)

Nowhere in the Wireline Broadband NPRM is reference made to VoBB. Cinergy has been beta testing IP Centrex, a VoBB service, for over four months and expects to deploy this product sometime in July or August of this year. This product is vastly superior to the current analog telephony used in today's businesses. It is so superior in functionality that we expect IP Centrex to eventually replace today's current analog telephony. If CLECs like Cinergy are denied access to unbundled elements necessary to furnish VoBB to their customers, the ILECs will eventually reestablish their monopolies over voice communications.

The Commission in the NPRM reaffirms that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive."²² Therefore, to the extent VoBB is a telecommunications service it cannot be an information service.

Under TA96, "the term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."²³ "Telecommunications," as defined by TA96, means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."²⁴ VoBB is offered directly to our customers for a fee. Also, the voice is transmitted between points specified by the caller by dialing the connecting telephone number. The voice is transmitted in real time and neither the form nor content of the voice transmission is altered. This is in contrast to information services such as internet access in which data is manipulated by computer processors.²⁵ Although VoBB is controlled by software,

²² Wireline Broadband NPRM, paragraph 14

²³ 47 U.S.C. § 153(46)

²⁴ 47 U.S.C. § 153(43)

²⁵ "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and included electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20)

1 it is still a telecommunications service because the definition of
2 information service specifically excludes computer processing for
3 "the management of a telecommunications service."²⁶

4 Voice is and has always been recognized as a telecommunications
5 service regardless of the transport mechanism. Voice is currently
6 converted to packets in the backbone of an ATM network and
7 reassembled for delivery. This is fundamentally no different than
8 the packetization of voice for transport across the "last mile" as in
9 VoBB.

10 The FCC has not indicated in this NPRM whether Broadband
11 transport necessary to provide VoBB will, like internet access, be
12 defined as an information service. CCC believes that such a
13 tortured definition would not stand up to legal scrutiny. Moreover,
14 the Commission would effectively be defining all voice carried
15 across ATM networks as information services. Therefore, the
16 Commission must take VoBB into account as the exception that
17 swallows the proposed rule.

18
19 To the extent Broadband transport becomes available for VoBB,
20 would the FCC then propose to police this transport facility to
21 prevent internet access? If so, does this not require more
22 regulation and not less regulation? Also, is it good public policy to
23 create a situation where assets cannot be used efficiently, thereby
24 enabling the public to receive better services and more favorable
25 prices?
26

27 Since VoBB is a telecommunications service, CLECs, including
28 CCC, have a statutory right to avail themselves of the provisions of
29 251 of TA96. These rights specifically include the right to petition
30 a State Commission for unbundled access to network elements
31 based on an impairment in the ability to provide the
32 telecommunications service the CLEC seeks to offer its
33 customers.²⁷ The FCC cannot deprive CCC of this right by simply
34 redefining the Broadband transport necessary for VoBB as an
35 information service.
36

37 BellSouth does not even address VoBB in its testimony because it is
38 clearly a telecommunications service and the proposed FCC rules clearly

²⁶ 47 U.S.C. § 153(20)

²⁷ See 47 U.S.C. § 251(c)(3) and 47 CFR § 51.317

1 do not apply to it. There is absolutely no precedent or logical reason why
2 local telephone service would not be defined as a telecommunications
3 service. Any attempt to classify local dial tone as something other than
4 telecommunications will certainly fail. A movie is a movie whether it is
5 viewed on videocassette or DVD, and a telephone call is a telephone call
6 whether it is received over the low frequency or high frequency portion of
7 the loop. There is simply no distinction in the Telecommunications Act of
8 1996 between digital and analog forms of delivery (e.g. Cinergy can
9 deliver VoBB via T-1s available under current rules) Therefore, the
10 proposed rule would not apply to unbundling of packet switching for use
11 as a local telecommunications service.

12
13 Ms Cox recognizes the unique jurisdictional issue raised by VoBB. In the
14 Kentucky arbitration hearing on this same issue Ms. Cox testified:

15 Q We are talking about using broadband for local voice service. In
16 your opinion would that fall under the jurisdiction of [the
17 Kentucky Public Service Commission]?

18 A To the extent that it was not also being provided Internet access
19 service, which the FCC has said is an interstate service but yes, it
20 could be if it was just providing voice.

21 Q So to the extent somebody is ordering – offering voice over
22 broadband, it is something that this agency could tariff and would
23 have jurisdiction over like any other voice service?

24 A . . . I would say it could generally be intrastate service, yes ²⁸
25

²⁸ *In Re Petition of Cinergy Communications Company For Arbitration of an Interconnection Agreement With BellSouth Telecommunications, Inc.*, Kentucky Public Service Commission Case No 2001-00432, Hearing Transcript, pp 161-162 (May 22, 2002)

1 Because unbundled packet switching is intrastate in nature, the Authority
2 can provide the requested relief within its own jurisdiction and for the
3 benefit of Tennessee residents without infringing upon the FCC's
4 jurisdictional territory

5
6 If the Authority provides unbundled packet switching for VoBB it can also
7 allow Cinergy to use that access to provide Internet access to its
8 customers. Section 706(a) of the Telecommunications Act provides
9 concurrent jurisdiction over advanced services:

10 The Commission and each State Commission with regulatory
11 jurisdiction over telecommunications services shall encourage
12 the deployment on a reasonable and timely basis of advanced
13 telecommunications capability to all Americans (including, in
14 particular, elementary and secondary schools and classrooms) by
15 utilizing, in a manner consistent with the public interest,
16 convenience, and necessity, price cap regulation, regulatory
17 forbearance, measures that promote competition in the local
18 telecommunications market, or other regulating methods that
19 remove barriers to infrastructure investment.

20
21 Therefore, the Authority can unbundle packet switching to encourage the
22 deployment of VoBB bundled with high-speed Internet access on a
23 reasonable and timely basis.

24
25 Finally, the TRA is charged with looking out for the public interest in
26 Tennessee This Authority should not concern itself with what the FCC
27 may or may not do in the future.

1 **Q.** **On Page 14 of her testimony, Ms. Cox states that in light of the**
2 **pending FCC NPRM proceedings there is no reason for the authority**
3 **to order the unbundling of packet switching and/or to create a new**
4 **UNE combination. She bases this assertion on the benefits of the**
5 **national UNE list, do you have any comment?**

6 **A** I think it is telling that Ms Cox chooses to refer to the UNE Remand
7 Order when it is convenient, and then spends so much effort attempting to
8 turn the FCC's impairment test on its head. Ms. Cox is completely
9 backward in her interpretation of the UNE Remand Order in light of
10 United States Telecom Association v. FCC, ____ F.3d ____ (C.A.D.C.
11 2002). The concept of a national UNE list was rejected in favor of a
12 “more nuanced concept of impairment” and one that looked at “specific
13 markets or market categories.”²⁹ The Authority should not consider the
14 benefits of a national list which has been rejected. Instead, the Authority
15 should focus only on whether Cinergy is impaired in providing services to
16 the small business and residential markets in BellSouth's Tennessee
17 territory. Because the D.C. Circuit required a “nuanced concept of
18 impairment,” the Authority is in the best position to determine whether or
19 not Cinergy is impaired. It is precisely for this reason that the Authority
20 should act on this issue rather than waiting for the FCC which may never
21 get around to analyzing whether or not Cinergy is impaired

²⁹ United States Telecom Association v. FCC, ____ F.3d ____ (C.A.D.C. 2002) (page 12 of the advanced version printed from <http://pacer.cadc.uscourts.gov/common/opinions/200205/00-1012a.txt>)

1

2

Finally, the FCC's NPRM proceedings have no affect on the independent unbundling authority granted to the Authority by Section 251 the Telecommunications Act of 1996.

3

4

5

Q. Do you have any further rebuttal of Ms. Cox's testimony?

6

A. No, that is all I have with respect to Ms. Cox, except as her testimony relates to and incorporates by reference portions of Mr. Milner's testimony or Mr. Williams' testimony.

7

8

9

Q. Have you read the testimony of Thomas G. Williams with respect to Issue 12, Line Splitting?

10

11

A Yes, I have.

12

Q. Do you have any comment on his testimony?

13

A. Frankly, I am surprised by his testimony. Mr. Williams has purposefully distorted the intention of Issue 12 to make it confusing for the Authority despite the fact that he was present at the Kentucky hearing and is well aware of the intent of this request.

14

15

16

17

18

In Issue 12, Cinergy was requesting the ability to provision line splitting over UNE-P loops At the time the Petition was drafted, perhaps Cinergy did not state the issue clearly. However, it is now clear that in addition to line splitting Cinergy needs to be able to provision BellSouth's wholesale

19

20

21

1 ADSL product over UNE-P. Since there is a lack of facilities-based
2 DLECs in Tennessee, BellSouth's wholesale ADSL is the primary means
3 of line splitting for Cinergy. Unless the Authority orders BellSouth to
4 provide its wholesale ADSL over UNE-P, Cinergy is effectively denied
5 the right to line split on UNE-P lines. The result is that UNEs as a form of
6 competitive entry are denied to Cinergy in violation of the Supreme
7 Court's directive in Verizon v FCC that there be three methods of
8 competitive entry.

9
10 Cinergy's request to combine BellSouth's wholesale ADSL product with
11 UNE-P is based upon state law rather than the Telecommunications Act of
12 1996 T.C.A. §65-2-208(c) provides in relevant part.

13 The authority shall, as appropriate, also adopt other rules or issue
14 orders to prohibit cross-subsidization, preferences to competitive
15 services or affiliated entities, predatory pricing, price squeezing,
16 price discrimination, tying arrangements or other anti-competitive
17 tactics.

18
19 BellSouth's refusal to provide its wholesale ADSL product over UNE-P
20 violates this statute in a number of ways. This is a tying arrangement that
21 does not allow a customer to purchase ADSL unless it also purchases
22 BellSouth's voice service. This is also price discrimination in that
23 BellSouth is not itself subjected to the same or similar limitations. For
24 example, BellSouth can continue to receive carrier access revenues for
25 originating and terminating access while continuing line splitting.

1 BellSouth's policy insures that competitors never receive this same
2 revenue stream.

3

4 The anticompetitive nature of this policy is illustrated in the rebuttal
5 testimony of Charles Frangos. In his testimony, Charlie illustrates just
6 how difficult it is to win a customer due to this policy. Further, Charlie's
7 testimony shows that this isn't simply a company policy implemented to
8 follow the FCC's instructions. Rather, it is intended to retain market share
9 and inhibit competition

10

11 Florida recently decided that BellSouth could not disconnect its
12 FastAccess service under state law because the practice had a
13 discriminatory effect on local voice service.³⁰ The Florida Commission
14 found BellSouth's policy anticompetitive.

15 We believe FDN has raised valid concerns regarding possible
16 barriers to competition in the local telecommunications voice
17 market that could result from BellSouth's practice of disconnecting
18 customers' FastAccess Internet Service when they switch to FDN
19 voice service. That is an area over which we do have regulatory
20 authority. We are troubled by FDN's assertions that BellSouth
21 uses its ability to provide its FastAccess Internet Service as
22 leverage to retain voice customers, creating a disincentive for
23 customers to obtain competitive voice service.³¹

³⁰ *In Re Petition by Florida Digital Network, Inc for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc under the Telecommunications Act of 1996, Florida Docket No. 010098-TP, Final Order (rel June 5, 2002) ("FDN Arbitration")*

³¹ *FDN Arbitration*, p 8

1
2 The Florida Commission found that it had authority under both state and
3 federal law to remedy this anticompetitive policy:

4 We agree that Section 202(a) of the Act and Section 364.10,
5 Florida Statutes, are applicable. Section 364.10(1), Florida
6 Statutes, provides that: A telecommunications company may not
7 make or give any undue or unreasonable preference or advantage
8 to any person or locality or subject any particular person or locality
9 to any undue or unreasonable prejudice or disadvantage in any
10 respect whatsoever. Similarly, Section 202 of the Act, among
11 other things, precludes a common carrier from making any unjust
12 or unreasonable discrimination in practices or services, directly or
13 indirectly. BellSouth's practice of disconnecting its FastAccess
14 service unduly prejudices or penalizes those customers who switch
15 their voice service, as well as their new carrier.³²
16

17 T.C.A. §65-2-208(c) is not substantially different from either the Florida
18 statute or Section 202(a) of the Communications Act. Therefore, like
19 Florida, the Authority should find BellSouth's anticompetitive policies to
20 be a barrier to competition and require BellSouth to provision its service
21 over UNE-P under Tennessee law.

22 **Q. In his testimony, Mr. Milner uses testimony filed by Cinergy in its**
23 **Kentucky arbitration and uses this as the basis for claiming that**
24 **Cinergy is not impaired. Do you agree with his assessment?**

25 **A.** No -- in the strongest possible terms In Kentucky, we attempted to show
26 that the FCC's hope for a level playing field when it comes to deploying
27 DSL was flawed from the very beginning. Mr. Milner has taken these
28 business cases, modified them, and then makes the illogical claim that this
29 shows that Cinergy is not impaired. Let me explain further.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

In attempting to show that Cinergy is impaired in Kentucky, we showed the economic realities of building DSL facilities that would be on par with BellSouth's facilities. In Kentucky, BellSouth averages 250 DSL customers per Central Office. In 1999, in its UNE Remand Order, the FCC claimed that it was hopeful that the number of broadband packet switches deployed by competitors would be approximately the same as those deployed by the incumbents. It is logical to assume that an equal number of packet switches equates to an equal number of customers served. Therefore, we took all the necessary elements (collocation build, UNE products, DSLAM equipment, etc.) and built a business plan. The business plan showed that even hitting 100% of the sales target over a two year period and serving those customers over a five year period produced insufficient profits to justify doing so. It also showed that falling short of the target would be financially ruinous for Cinergy – in fact, falling just 10% short of the target would lead to an operation that was still losing money after five years of operation. And lastly, we showed that using the incumbent's packet switching infrastructure in order to build up a customer base would allow Cinergy to build a business plan that would succeed.

³² *FDN Arbitration*, pp 9-10

1 BellSouth would like the TRA to believe that making some basic changes
2 to the business plan we submitted in Kentucky leads to the conclusion that
3 Cinergy is not impaired. However, BellSouth relies on the same
4 fundamental flaw made by the FCC in the UNE Remand Order.

5
6 **Q. What is this fundamental flaw?**

7 A. The fundamental flaw used by BellSouth is that it is reasonable to believe
8 that Cinergy would obtain the same number of customers as has BellSouth
9 if Cinergy were to deploy DSL facilities.

10
11 **Q. Is it possible to predict the number of customers that Cinergy might
12 obtain if it deployed its own DSL facilities?**

13 A. Predicting the number of Customers that Cinergy would obtain is difficult,
14 but BellSouth has provided data that does show the absolute upper limit on
15 the number of customers that Cinergy could obtain.

16
17 **Q. Please Explain.**

18 A. Certainly. As I explained in my direct testimony, BellSouth's federally
19 tariffed wholesale ADSL service is sold by many Network Service
20 Providers (NSP) in Tennessee. These NSPs compete head-to-head with
21 BellSouth in selling DSL in Tennessee. Customers are unaware that the

**THIS PAGE FILED UNDER SEPARATE COVER AND CONSIDERED
PROPRIETARY INFORMATION**

1 Milner deploys a DSLAM capable of serving approximately 250
2 customers and then attempts to show that this leads to a profitable business
3 for Cnergy. However, reality as I just described shows that Cnergy
4 would “knock the cover off of the ball” if it obtained 32 customers.
5 Exhibit PLH-R3 is identical to Exhibit WKM-3 except that it shows the
6 results of acquiring only 32 customers. Instead of being rewarded with an
7 Internal Rate of Return of 46.2%, Cnergy instead would **never** get a
8 return on its investment. Because the operation is **still losing money after**
9 **five years**, the Internal Rate of Return cannot be calculated. After five
10 years, Cnergy will have lost \$315,488 and will have an ongoing annual
11 loss of just over \$42,000. And this is for just one Central Office. To
12 compete head-to-head with BellSouth, Cnergy would need to duplicate
13 this deployment 166 times.³⁵ This leads to a **five year loss of \$52,000,000**
14 (\$52 million) – of course, Cnergy would be out of business long before
15 this happens so the actual loss would be less.

16 **Q. Are there other flaws in Mr. Milner’s Exhibits?**

17 A. Yes. Mr. Milner did not use UNE and collocation costs from Tennessee,
18 but rather costs from Kentucky. My exhibit PLH-R3 contains those same
19 incorrect numbers simply for the purposes of comparison.

³⁵ In this instance, I am only including deployments in Central Offices – the numbers would get significantly worse if we also included deployments in remote terminals

1 **Q. In his testimony, Mr. Milner complains about Cinergy's use of Net To**
2 **Net Technologies' 12 port line card instead of their new 24 port line**
3 **card. Is there a reason why Cinergy used the 12 port line card?**

4 A. Yes, but let me first state that Mr. Milner's language is exceptionally
5 good. It certainly seems to me that Mr Milner wants to imply that I
6 inflated my numbers by using the 12 port line card instead of the 24 port
7 line card, but he is careful to never state this directly. I believe there is a
8 good reason for this Mr. Milner knows that the 24 port line card was not
9 announced by Net to Net Technologies until April 29, 2002. I submitted
10 my original business plans in March – more than one month before the 24
11 port line card was announced

12
13 Even so, there is justification for using the 12 port line card instead of the
14 24 port line card BellSouth claims that Cinergy had an opportunity to
15 deploy ADSL back at the time BellSouth started their deployment over 2
16 years ago, but simply blew it. If Cinergy had deployed DSLAM
17 equipment 2 years ago, the 12 port line card would have been the only
18 option available so the costs are completely reasonable.

19
20 **Q. In his testimony, Mr. Milner claims that Cinergy should use**
21 **equipment from either Copper Mountain or from Alcatel? Why**
22 **doesn't Cinergy consider these manufacturers?**

1 A. Alcatel is one of the vendors that Cnergy considered. However, Net To
2 Net Technologies DSLAM has significant advantages over Alcatel As
3 Mr. Milner pointed out, Alcatel's DSLAM uses a packet switching
4 protocol called ATM for backhaul. If one is deploying lots of DSLAMs,
5 then one must also deploy a large ATM network – a very expensive
6 venture. ATM requires significant capital investment and significant ATM
7 expertise. Net To Net, on the other hand, uses IP over Ethernet for its
8 backhaul. This makes integration with existing IP networks seamless and
9 inexpensive – reducing long-term costs. When you couple this with the
10 emergence of Voice over IP (VoIP) as the dominant Voice over
11 Broadband technology being deployed, it just makes sense to use
12 equipment that uses IP switching (specifically IP over Ethernet) as its core
13 switching technology

14
15 Cnergy has not given Copper Mountain serious consideration because of
16 concerns over Copper Mountain's financial position. These days it is
17 extremely important that companies choose vendors with solid financial
18 positions. In assessing Copper Mountain's financial records, our Chief
19 Financial Officer, Lohn Weber, recommended that we avoid making any
20 commitments to deploying Copper Mountain's equipment.

21

1 **Q. Do you have any other comments on Mr. Milner's discussion of**
2 **equipment choices in his testimony?**

3 A. Yes. In Mr. Milner's testimony on page 16, he makes the following
4 statement:

5 *Although I find it curious that Cinergy advocates the unbundling of*
6 *BellSouth's DSLAM equipment (which uses the ATM protocol) but*
7 *assumes a different type of equipment (that is, the Net to Net*
8 *Technologies equipment operating in Ethernet protocol) for its*
9 *business case ..*

10 I believe that this statement either indicates that Mr. Milner doesn't
11 understand Cinergy's request, how BellSouth's wholesale ADSL service
12 works, or both. Our request is that the unbundled ADSL work exactly the
13 same as the wholesale ADSL product works – that it include the ADSL
14 transport between the DSLAM and the end user as well as ATM transport
15 back to a single meet point within each LATA. The ATM transport, then,
16 is provided by BellSouth's ATM network, not an ATM network provided
17 by Cinergy. Since there are only 5 LATAs in Tennessee, Cinergy would
18 only need 5 ATM ports – a reasonable investment and significantly
19 smaller than what we would have to deploy if required to meet BellSouth
20 in every single Central Office.

21

22 **Q. You have made two significant claims on the flaws with Mr. Milner's**
23 **exhibits. The first was that the number of customers serviced in**

1 **absurdly high. The second is that the costs used are those Cinergy**
2 **would see in Kentucky instead of those Cinergy would see in**
3 **Tennessee. Is there an accurate analysis for the state of Tennessee?**

4 A Yes. In Exhibit PLH-R4 I have updated Mr. Milner's Exhibit WKM-3
5 with the correct costs in Tennessee. As I explained earlier, it is absurd to
6 think Cinergy could ever have as many customers as BellSouth – and I've
7 effectively shown that even acquiring as many as 32 customers served out
8 of a Central Office is overly optimistic. At this level, it doesn't make sense
9 to deploy typical Central Office DSLAMs. Instead, it is much more
10 economical to deploy smaller DSLAMs capable of serving 8, 12 or 24
11 ports. This is somewhat of a moot point because to eliminate any
12 complaints that BellSouth might have in our choice of DSLAMs, I've
13 assumed the cost of the DSLAMs to be zero (\$0.00) And to avoid
14 complaints that we have underestimated the number of customers we will
15 acquire, we'll use 40 (more than all of the competitors combined) The 40
16 customers are split evenly between residential and commercial –
17 extremely conservative – it certainly would be the case that the real
18 number would be weighted towards residential users. To summarize – 40
19 customers and no cost for the DSLAMs (the \$1,339 shown in the business
20 plan is for DS0 and DS3 patch panels in the collocation space) I've also
21 raised the NRC installation charge from \$100 to \$200 since BellSouth
22 complained in Kentucky that our rate of \$100 was too low. Our revenue
23 rates match BellSouth dollar for dollar. Most other costs are TELRIC rates

1 set by the TRA. The few exceptions are historical costs incurred by
2 Cnergy in other similar business services. These include the Internet
3 Services costs (email and bandwidth), sales costs, and other operating
4 costs (provisioning, project management, etc.).

5
6 Given the assumptions I have made, the results are nearly as shocking as
7 those in Exhibit PLH-R3. The five year business plan, even with these
8 extremely BellSouth-friendly assumptions, still hasn't turned cash flow
9 positive after five years. And just as with Exhibit PLH-R3, it isn't possible
10 to calculate the Internal Rate of Return since it never makes money. The
11 good news is that we only lose \$64,318 per Central Office which isn't
12 nearly as much as we lose under Exhibit PLH-R3. And after rolling out to
13 all 166 Central Offices, we will only lose \$10,676,788 so we won't go out
14 of business with this plan quite as fast.

15
16 As a point of reference, the five-year breakeven point for this business
17 plan as presented is 65 customers. If, however, Cnergy's business strategy
18 was based on first acquiring customers via unbundled packet switching
19 and then later converting these customers to Cnergy's facilities after a
20 concentration of customers had developed, then the breakeven drops to 51
21 customers. In other words, after acquiring 51 customers via unbundled
22 packet switching, Cnergy should then consider installing its own

**THIS PAGE FILED UNDER SEPARATE COVER AND CONSIDERED
PROPRIETARY INFORMATION**

1 **Q. How does Cinergy's request for unbundled packet switching relate to**
2 **the Authority's decision to order BellSouth to deploy NGDLC dual**
3 **purpose line cards?**

4 **A**I am certainly pleased that the Authority recognizes that there is a need for
5 unbundled packet switching. Also, I am glad that the Authority is taking
6 positive steps to ensure that there is consumer choice and that BellSouth is
7 not able to fully remonopolize the voice industry through its DSL rollout.
8 However, I am still concerned that the step taken in the April 3, 2002
9 Order is too small and limited to be of much value to Cinergy.

10

11 My concern is that there still will not be a viable business plan for CLECs
12 of any size. In order to take advantage of the order, Cinergy will still need
13 to collocate in each Central Office, install and maintain an ATM network,
14 and have backhaul to Cinergy's facilities. The costs involved are very
15 similar to those presented in Exhibit PLH-R4 – the business plan itself is
16 very similar. Keep in mind that in Exhibit PLH-R4 I used a cost of \$0.00
17 (zero dollars) for the DSLAM(s). Since I used a newer generation
18 DSLAM, I didn't need any ATM equipment. Since the DSLAM
19 functionality and the transport from the RT to the CO will be provided by
20 BellSouth, it will look like Cinergy has connected its network to a
21 DSLAM that didn't cost anything. There are two additional costs as
22 compared to Exhibit PLH-R4. First, Cinergy will need to install an ATM

1 network to connect to each NGDLC homed back to the CO. Second,
2 although the rate has not yet been set, there will be a fair and reasonable
3 fee paid to BellSouth for utilizing their services. As it stands, the five-
4 year break-even on Exhibit PLH-R4 is 65 customers over the two year
5 sign up period. Considering the likely penetration rate, the real costs
6 involved, and the level of risk required, I seriously doubt that Cinergy or
7 any other CLEC will find this a very attractive alternative

8
9 **Q. Mr. Milner claims that BellSouth should not have to unbundle its**
10 **packet switching network because it was not designed with**
11 **unbundling in mind. Do you agree with Mr. Milner?**

12 **A.** If I may paraphrase, it sounds as if Mr. Milner is claiming that the TRA
13 should not require unbundling because it would just be too hard. I am not
14 aware of any rulings from the FCC which provide relief in the face of an
15 impairment because unbundling was deemed too difficult. I do have a few
16 comments regarding the absurdity of this

17
18 First, making this claim with a service that BellSouth rolled out principally
19 after the UNE Remand Order demonstrates that BellSouth's monopolistic
20 tendencies run extremely deep. BellSouth was completely aware that they
21 might be required to unbundle packet switching in the future and should

1 not be rewarded for completely thumbing their nose at unbundling
2 requirements.

3
4 Second, BellSouth has admitted in discovery that it was for some time
5 provisioning ADSL over UNE-P lines. BellSouth claims that this was a
6 mistake and later corrected this mistake. Related to this, I want to point
7 out one specific comment made by Mr. Milner in his direct testimony:

8 If BellSouth were required to provide its ADSL
9 solution to Competitive Local Exchange Carriers
10 ("CLECs") end users, which are without BellSouth
11 telephone numbers, the provisioning systems (and
12 also the ordering, billing, repair, and maintenance,
13 etc systems) would have to be revamped. The
14 CLEC would now become the voice provider, and
15 accordingly there no longer is a working BellSouth
16 telephone number, but rather, a CLEC telephone
17 number that is not recognized by BellSouth's ADSL
18 loop qualification systems.³⁷ (emphasis added)

19 The last part of that statement is just maddening – let me explain me why
20 BellSouth's Loop Qualification System (LQS) recognized CLEC UNE-P
21 provisioned lines until November, 2001. I have included as exhibit PLH-
22 R5 a copy of an email exchange between Hank Chow of BellSouth's
23 Wholesale Group and Kiki Deboe, Cinergy's provisioning manager. In
24 this email Mr. Chow explains that UNE-P lines no longer show up in
25 LQS, that UNE-P lines were qualifying in error in the past and that this
26 mistake has been corrected. Keep in mind that BellSouth started rolling

³⁷ Milner Testimony, p. 6

1 out ADSL in September of 1998' So from September 1998 to November
2 2001, more than 3 years, UNE-P lines appeared in the LQS' So Mr
3 Milner's claims are extremely hard to believe. BellSouth admits that they
4 have provisioned ADSL on UNE-P lines in the past and BellSouth
5 recognized UNE-P phone number in LQS for more than three years So
6 not only is this argument completely without legal merit, it appears that
7 there is plenty of evidence to suggest it is categorically wrong.

8 **Q. Does this conclude your testimony?**

9 **A Yes**

Promoting Broadband Investment and Avoiding Monopoly

Robert E. Hall

Stanford University

and

William H. Lehr

Columbia University

and

MIT Internet and Telecoms Convergence Consortium

February 21, 2002

Executive Summary

A revitalized telecom sector is critical to the health and vigor of the U.S. economy. The poor performance of the sector for the past two years has been an important component in the current recession just as the boom in telecom and information technology more broadly was a substantial contributor to the preceding period of strong economic growth.

The disappointing growth of broadband may be one factor holding up the return to health of the telecom sector. As long as most consumers continue to connect to the Internet via low bandwidth dial-up connections, much of the perceived promise of the Internet remains unrealized. This in turn dampens demand and reduces incentives to invest in next-generation communication services, Web-based content and applications, and the equipment needed to deliver and take advantage of these. The entire high-tech sector is suffering as a result.

Support is growing for a broadband policy that would promote both expanded investment in broadband infrastructure and wider penetration of broadband access services. As of September 2001, 11 percent of the U.S. population—20 percent of those with Internet

This study was supported by AT&T.

access at home—subscribed to broadband access services.¹ While these penetration statistics reflect impressive growth, they are still far below availability of broadband services. In this paper, we concentrate on the issue of efficient policy for managing the traditional phone companies, the Bells. Despite hopes that the success of the introduction of competition to long distance could be duplicated in local telecom markets, the Bells remain dominant in their local markets. Nonetheless, proposals to relax regulatory constraints on the Bells are under consideration. Proponents of this approach argue that the nondiscrimination and unbundling provisions associated with the Telecom Act of 1996 are deterring investment in broadband infrastructure and harming prospects for the expansion of broadband. Of special note, Congress and policy-makers are once again considering passage of the Tauzin-Dingell bill which would effectively eviscerate the pro-competitive framework adopted by the Act.²

This paper explains how the policy regime established by the Telecom Act could promote competition and efficient growth of broadband and why competition will spur greater investment in telecom infrastructure and complementary assets. In particular, we explain the benefits of the provisions of the Act that promote competition by opening the monopoly facilities of the Bells to use by their rivals. Relaxing the pro-competitive interconnection requirements on the Bells in the current environment would harm the prospects for competition up and down the communication services value chain, and, thus, would discourage investment in broadband infrastructure. Furthermore, relaxing interconnection regulations on the Bells at this time will increase the likelihood of their remonopolization of telecommunications and result in more stringent, costly, and intrusive regulation in the future.

Granting the Bells reduced regulation for broadband services would be a major shift in regulatory policy that would accomplish exactly the opposite of its intended effect: it would increase overall regulation, it would decrease investment, and it would reduce prospects for competition. In all these respects, it would harm consumers. Absent adequate regulatory

¹ See *A Nation On-Line: How Americans are Expanding Their Use of the Internet*, National Telecommunications and Information Administration, Washington, DC, February 2002.

² For a detailed explanation of why Tauzin-Dingell would be harmful for competition, see Jim Glassman and William Lehr, "The Economics of the Tauzin-Dingell Bill: Theory and Evidence," white paper, June 2001 (available at <http://www.techcentral-tation.com/>).

safeguards to assure competition in the Bells' last-mile circuits, consumers would suffer reduced choice, higher prices, and lower quality for broadband services.

I. Introduction

Information technology led the economic boom of the 1990s. Robust competition prevails in most segments of the information technology value chain. Competition has stimulated innovation, investment, and productivity improvements. From chips to software to applications, from equipment for service providers to PCs for consumers, there is robust competition. Telecom is the circulatory system of the modern IT-based economy. Many telecommunication services are actively competitive—from long distance to cellular to wide area data services. But the on-ramps to the information highway remain in the hands of monopolists. The last mile of the telecom network lacks the competition that has invigorated the rest of the network. The last mile remains in the hands of the traditional phone companies, the Bells.

Bell control of the last mile means that continuing regulation is essential. Because homeowners and small businesses rarely have ways to gain access to the telecom network apart from the Bells' last-mile connections, the Bells could extract the full monopoly value of that network if they were not regulated. As competitive service providers add value to telecom products, the Bells would absorb that value through higher prices for the last mile, and consumers would be denied the benefits of the added value.

The Bells are sluggish organizations that have failed to promote the use of their existing wires for broadband. Though the Bells' circuits are in many cases the technically superior way to bring broadband to the home, cable television suppliers have leaped ahead of the Bells in the broadband business. But broadband in general has not reached many homes. Most consumers still connect to the Internet over low-bandwidth dial-up connections that limit their ability to take advantage of many existing and potential uses of the Internet. Further, the Bells presumably would resist Internet-based videophone or even Internet-based standard phone service because it cannibalizes their existing products. Indeed, they have been slow to deploy DSL because of its affect on their ability to sell second lines and alternative high-priced, high-speed services such as T1s to business customers.

The chicken-and-egg effect has inhibited the development of broadband. Because the Bells have not promoted broadband connections effectively nor permitted others to promote connections over Bell wires, there are relatively few customers for broadband products. With few potential customers, developers and sellers of products have held back. Movie downloads are just beginning to appear. The recent proliferation of DVDs at \$9.99 retail makes it clear how large this market could be—the price for the same movie as a download could be \$5 and generate as much profit for the movie owners. In videophone, the chicken-and-egg problem is particularly severe—nobody wants to buy the service until many others have it.

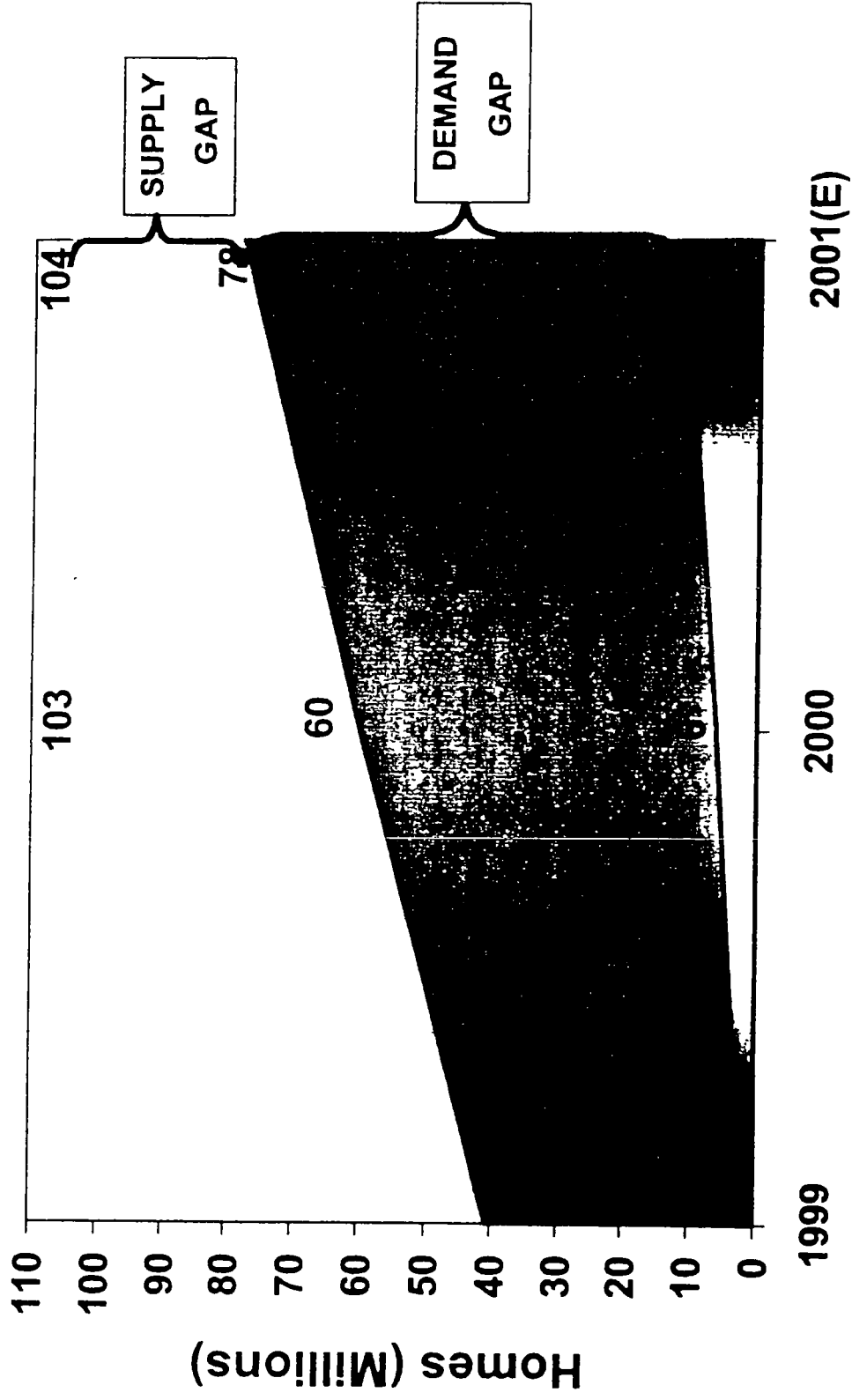
Broadband services are available to over 75 percent³ of the U.S. population (see Exhibit 1), yet broadband penetration in the U.S. falls far behind the leader, Korea.

Existing wires to homes are only a transitional solution to providing widespread broadband service. Ultimately, each home will desire more bandwidth that requires new technology based on a hybrid of fiber optics and existing wires. The technology to do this exists, but providing it more broadly will require substantial new investment. To go much beyond the current generation of 1 Mbps broadband services, service providers will have to install substantial additional fiber optic capacity and advanced electronics in local access networks.

Planning for the future requires close attention to the role of competition. It appears likely to be inefficient for competing suppliers to entirely duplicate fiber last-mile networks. If each home should have only one all-fiber broadband circuit, then suppliers of other services, such as local and long-distance transport and Internet services and products, should compete to use the single pipe to the home. Even in the local network, regardless of the last-mile fiber economics, competition is the right model for local switches, backhaul facilities, and additional equipment such as web servers, DSLAMs, or other equipment specifically intended to support broadband services. And it goes without saying that competition should

³ As of June 2001, 76% of the population lived in zip codes that were served by at least one broadband service provider (see page 4, *High-Speed Service for Internet Access as of June 30, 2001*, Industrial Analysis Division, Federal Communications Commission, February 2002). Because of local infrastructure quality issues and because of the distance that some households are from the broadband serving office, this estimate likely overstates actual availability.

Exhibit 1: Supply Exceeds Demand (Yankee Group)



U.S. Households ■ Wireline BB Homes Available □ Subscribers

Sources: US Census Bureau; Yankee Group, E-Networks & Broadband Access, Sept 2001

remain where it is flourishing already, in medium and long-distance transport and in Internet services and products

The Telecom Act of 1996 established a regime to harness competition wherever it is efficient in the telecom network. The Act recognized the importance in that regime of the monopoly last-mile wires of the Bells and required the Bells to make those wires available to their rivals

Experience since the passage of the Telecom Act shows that there can be no doubt that the Bells' rivals are willing to invest in local facilities. Consider AT&T: since 1999, the company has invested over \$4.5 billion in creating the infrastructure to provide local services. This investment has helped build new facilities that include 118 local switches, 80 collocation sites that have been upgraded with DSLAMs and new electronics to make them DSL-ready, and 17 thousand route miles of new fiber supporting 6,657 SONET rings.⁴ Moreover, since 1996, new carriers other than the Bells and established long-distance carriers invested \$56 billion in creating local infrastructure.⁵ During this same period, the Bells also invested heavily. Their cumulative investment was \$100 billion which was 22 percent higher than their investment during the four years preceding passage of the Act,⁶ or, industry investment was 90 percent higher than during the preceding period.⁷ These figures provide compelling evidence that the unbundling provisions of the Telecom Act encouraged substantial new investment in local infrastructure by both new carriers *and* the Bells.

The Telecom Act did not promise competition in the last mile. Rather, its regime involves competition where efficient and intelligent use of the Bells' last-mile monopoly wires at regulated rates otherwise. Duplication of local wires does not make sense when it would be uneconomic. The Bell infrastructure is immense, cumulating to \$333 billion of historical

⁴ From AT&T internal sources.

⁵ Cumulative CLEC investment from 1997 through 2000 was \$55.9 billion, as reported in *The State of Local Competition 2001*, Association for Local Telecommunication Services (ALTS), February 2001.

⁶ The Bells invested \$82 billion from 1992-1995 and \$100 billion from 1997-2000. BOC data for 1992-1999 is from Figure 10 in *Telecommunications @ the Millenium*, Federal Communications Commission, February 8, 2000, data for 2000 is from Table 2 in *Statistics of Communications Common Carriers 2000/2001*, Federal Communications Commission, September 1, 2001.

⁷ CLEC investment was negligible before 1997 so total industry investment in local infrastructure was approximately \$82 billion (see note 6) from 1992-1995. From 1997-2000, CLEC investment was \$56 billion (see note 5) and BOC investment was \$100 billion (see note 6). Therefore, total investment increased 90% (=156/82 - 1).

investment at the end of 2000.⁸ This legacy investment should not be duplicated—rather, technically more advanced circuits should replace it over time. These circuits will almost certainly be monopolies too. Only in quite dense and high demand locales does it make sense for a competitor to invest in duplicate last-mile circuits.

For the foreseeable future—well into the era when homes will have new advanced connections to the broadband network—policy will need to pay close attention to the role of the last mile. As long as the Bells retain control over most of the last mile, there will be a continuing need to assure non-discriminatory access by other carriers to the Bells' last-mile circuits. Assuring such access will protect competition and incentives to invest and innovate elsewhere along the IT value chain.

Today, the Bells remain unique in owning the only ubiquitous network providing telephone and access services in their local serving areas. These networks were constructed under government-sanctioned monopoly franchises over the past century, and represent hundreds of billions of dollars of investment financed by rate payers. Getting to the next generation of networks will require billions of dollars of additional investment. Moreover, the new broadband infrastructure and services will not replace the current generation of narrowband infrastructure and services overnight. The new infrastructure will be added incrementally and will be closely integrated with the legacy infrastructure in order to continue to provide the voice services used by over 140 million customers today. Consumers will migrate over time, although the pace of migration may be quite rapid in comparison to our experience with past technology transitions such as from the telegraph to the telephone or from black and white to color TV.

Telecom policy today is at a decision point about the future roles of the Bells. Since the breakup of the old Bell system in 1984, the thrust of policy has been to extend the arenas where competition rather than regulation governed the market. The introduction of competition to long distance was a stunning success. The opening of local toll markets to competition over the past decade was another step forward for the competitive model. The Telecom Act was an ambitious extension of this philosophy—it hoped to bring many new

⁸ Total BOC telecommunications plant in service at the end of 2000 was \$333 billion (see Table 2-7 in *Statistics of Communications Common Carriers 2000/2001*, Federal Communications Commission, September 1, 2001).

competitors into the telecom business by requiring the Bells to permit these competitors to use the Bells' last-mile and other facilities. Telecom policy from 1984 through the Telecom Act sought to restrain the Bells in certain carefully considered ways to create an environment for competition. Some observers favor the continuation of this regime, with restraints altered as appropriate as conditions change. Others propose to eliminate the restraints so that the Bells can become bigger players. A particular driving force of the latter view is that the Bells would propagate broadband more energetically if freed from the restraints of existing policy.

We believe firmly in continuation of policies that focus on stimulus to competition through efficient restraints on the Bells. In particular, we believe that policy today should follow a path that will lead, eventually, to a regime where most homes have advanced broadband connections providing a wide variety of services offered by vigorously competitive sellers, and where no regulation of the system, even at the local level, is needed. We believe that the removal of restraints on the Bells today would move policy away from this long-term goal. Enlarging the roles of the Bells would require evolution toward more, rather than less, regulation.

II. Bottleneck Facilities, Unbundling, and Investment

Six years ago, Congress passed the Telecom Act of 1996 to harness the power of competition. Recognizing that the Bells' last-mile circuits could remain as monopolies, the Act sought to assure non-discriminatory equal access to those circuits and other local facilities through unbundling and other network interconnection requirements. The Act required the Bells to make their existing network infrastructure available to competitors on terms set by regulators to offset monopoly power. Before the Act, except in specialized circumstances, it was simply uneconomic to attempt competing with the entrenched Bells, already in possession of ubiquitous networks that provided scale and scope economies and positive network externalities unavailable to others. If successfully implemented, the Act would have allowed competitors to share in those efficiencies and to bring the discipline of competition to local markets to the fullest extent possible.

Not surprisingly, the Bells have resisted the interconnection mandates of the Act since its passage. The Bells have sought to delay implementation of the Act at every juncture. The

latest attack on the Act invokes broadband investment. The Bells argue that investments needed to deliver next-generation services will not occur unless the Bells are granted further regulatory relief. The Bells' own investment behavior tells a rather different story. The Act's promise of access to Bell facilities attracted an influx of rivals in local service, both established long-distance carriers and new companies. As these rivals invested, the Bells *increased* their own investments. Further, the Bells invested in DSL service and promoted it. DSL services grew quite rapidly—as a result of investments and promotion by both the rivals and the Bells. The investments included subsidizing DSL modems and installation, as well as significant marketing costs. Recent disappointments in DSL are the result of the collapse of many of the new rivals, the subsequently higher prices charged by Bells once they no longer face competition, and because of the poor quality of service offered by the Bells which may have turned many would-be consumers away.⁹

The evidence supports the view that competition spurs Bell investment. Nonetheless, the Bells are challenging the provisions of the Telecom Act that make competition possible. The Bells argue that making their facilities available to rivals at regulated prices inhibits their investment incentives. In particular, they now propose that their broadband investments be exempt from the unbundling provisions of the Act and that regulators abstain from regulating broadband services in the future. The Bells have sought to push their agenda for removing the pro-competitive features of the Act by their support for legislation such as the Tauzin-Dingell bill, in filings before the FCC, and in appeals to the Executive Branch for an exclusionary broadband policy.

Removing the pro-competitive provisions of the Act with respect to broadband would dampen all carriers' incentives for investment in broadband facilities. In most locations, it is neither profitable nor economically efficient to build new circuits to homes at this time. Current investments should be based, primarily, on effective use of existing last-mile facilities—the Bells' loops and the cable companies' coaxial circuits. In this setting, competitors will invest only if rivals have access to the existing loops and the Bells are restrained from extracting the full monopoly value of those loops. Absent the spur of

⁹ The first author has attempted to sign up for DSL in Menlo Park, California, in a number of ways, all unsuccessful. Indeed, even the link on Pacific Bell's web page for residential DSL to check for availability was not working for several months (http://www.pacbell.com/DSL/15294_00.html).

competition, the Bells will reduce their own investment commitments to avoid cannibalizing lucrative revenues from leased line and other data services to businesses and second lines to consumers

Current policymaking needs to consider the implications of today's decisions for the future. If the policy regime adopted today excludes rivalry in broadband service over the Bells' last-mile facilities, the Bells will become the single entrenched provider of broadband service over the existing copper and hybrid fiber/copper loops, the only rivals in broadband will be cable companies. Thus broadband will have only two sellers, and a duopoly with a Bell and a cable provider may fail to offer vibrant competition. Either broadband customers will pay high prices or regulation will need to be extended to broadband services. While the Bells would undoubtedly prefer the more profitable option of remaining an unregulated monopolist, they have ample experience operating quite successfully under regulation, too. If it is necessary to reinstate monopoly regulation, it likely will be in a more complex environment in which it will be harder to draw clear industry and service boundaries, and hence, more difficult to regulate effectively. It is hard to imagine that consumers would achieve anywhere close to their maximum potential from broadband.

By contrast, the framework embodied in the Act encourages investment by both new companies *and* the Bells. We cited evidence supporting this point earlier. Bell and rival investment both increased substantially following passage of the Act. The Bells responded to the increased threat of competition by accelerating their own investments to assure that the newer plant being installed by the rivals did not place the Bells at a competitive disadvantage. This is a normal response to rivalry.

Mandatory access to last-mile circuits and other services, at appropriate rates, encourages investment all along the value chain. It encourages investment both upstream and downstream of the bottleneck because it assures all competitors that they will be able to purchase an essential input. The value of complementary investments upstream—Internet infrastructure and broadband content—and downstream—home networking and equipment—of the local access bottleneck is diminished by the threat of monopoly power over the bottleneck. It is monopoly power over the bottleneck that reduces incentives to invest.

As with many other infrastructure industries in which interconnection regulations are applicable, incumbents continue to invest as long as regulators set prices appropriately. And, there is no presumptive reason to believe that telecom regulators have or would set interconnection prices that are inconsistent with continued investment. Certainly, the experience of rate setting both before and since passage of the Telecom Act refutes the view that regulators deny incumbents a fair opportunity to recover their economic costs. Moreover, the sustained high market valuations of the incumbents since divestiture and even through the current slump in the sector provide potent evidence that investors do not believe that regulators deny incumbents a fair return.

In the context of a network industry, interconnection regulations can also encourage investment in the alternative facilities that can help eliminate many of the sources of the local access bottleneck that gave rise to the regulations in the first place. The unbundling provisions of the Telecom Act were intended to facilitate modular and incremental entry into local services. Initially, new entrants had no local access facilities and so they needed unbundled access to all of the components of the local network. Unbundling rules reduced economic entry barriers to competitive providers.

Unbundling allows entrants to mix and match leased components from the Bell with whatever facilities the entrant has already put in place to deliver end-to-end retail services. Without access to the complete complement of components, investments in portions of the local access network make no sense. Additionally, building out a network takes time and unbundled access provides the entrant with the means of offering retail services to the entire market, thereby allowing the entrant to invest efficiently in creating a brand image and in retail marketing. Even entrants that do not invest in their own network facilities but continue to lease everything from the Bell will make substantial retail investments. Pure reseller competition can play an important role in overall market competition as the long distance industry demonstrates.

If priced at long run incremental cost, the availability of unbundled network access provides efficient investment incentives to both entrants and the Bells. The entrants will lease facilities from the Bell when that is more efficient (that is, when constructing duplicate facilities would result in higher average total costs) and will invest in their own facilities when that is

warranted. If unbundled access is priced too high, then entrants are, in most cases, deterred from investing at all, or when they do invest, from over-investing in their own facilities. Indeed, if there were a competitive wholesale market in the various elements that comprise a local access network, we should expect to see the prices of these elements approaching the same price as the appropriate regulated price. By contrast, in the absence of unbundled access at a regulated price, the Bell would have an incentive to set the price significantly above the economic cost in order to extract monopoly profits from competitors, or even more likely, to deny access altogether, thereby effectively eliminating the threat of competition.

An extensive cross-national study by the OECD commented that

Policies such as unbundling of local loops and line sharing are key regulatory tools available to create the right incentives for new investment in broadband access. The evidence indicates that opening access networks, and network elements, to competitive forces increases investment and the pace of development.¹⁰

The OECD study provides further confirmation that bottleneck access regulations have beneficial effects in both the U.S. and other countries that have employed such policies. If unbundling rules deterred investment, then how could one explain that startup local carriers were willing to invest 64 percent of their revenue in local access services (compared to 21 percent for the Bells)?¹¹

If sufficient facilities-based investment does occur under the unbundling rules, then competitive sources of wholesale supply for some of the components of local access networks may develop. As this occurs, unbundling requirements for those elements may be safely relaxed without fear that such deregulation will injure consumers or deter additional investment.

¹⁰ See *The Development of Broadband Access in OECD Countries*, Directorate for Science, Technology and Industry, Organization for Economic Cooperation and Development (OECD), DSTI/ICCP/TISP(2001)2/Final, October 29, 2001, page 4.

¹¹ Data for CLECs is from ALTS Report (note 5) and data for the Bells is from the *Statistics of Communication Common Carriers 2000/2001* (note 6).

III. New Rules for New Wires?

The Bells have argued that investment in broadband facilities distinct from telephone service should not be subject to the unbundling provisions of the Telecom Act. At one level, this argument is sound, if the investment is wholly new and all competitors have an equal opportunity to take advantage of the new technologies and market opportunities they make possible. If a Bell wanted to enter the breakfast cereal business, there would be no need for unbundling provisions on its activities in that business.

Broadband is not breakfast cereal. Nearly all of the proposed broadband investments by the Bells represent incremental upgrades to the existing infrastructure. These investments are fully integrated with the Bell business plans and operations, and are closely coupled to the existing investment in the Bells' local networks. The Bells have been anticipating migrating to broadband networks for decades and have been putting the necessary investments in place since well before the passage of the Telecom Act. The conversion from analog to digital, investments in fiber optic cables, and the addition of packet switching technology have all been undertaken as part of the Bells' programs for upgrading their networks. At each stage, the choice of particular investments takes account of the existing infrastructure. This is economically efficient and sensible, but it also means that it is difficult to draw a clear boundary between what constitutes investments in new infrastructure rather than standard infrastructure. The whole vision is to migrate to a broadband platform that is capable of supporting integrated services.

SBC's Project Pronto is a good example. When SBC originally announced its investment in the project, the company argued convincingly that the investment was wholly justified in terms of expected savings in operating costs on current services and savings on future facilities expansion. Project Pronto made sense even if expected revenues from new services is ignored.¹²

¹² See "SBC Announces Sweeping Broadband Initiative," SBC Investor Briefing, No. 211, October 18, 1999, page 2.

In an earlier paper, we pointed out the constructive role that structural separation of the Bells could play.¹³ The idea is to separate a Bell into independent wholesale and retail companies. The wholesale company would own the last-mile circuits and certain other local network infrastructure. Its customers would include the retail Bell along with all other carriers that chose to compete in providing telecom services. The wholesale Bell would treat all of its customers equally, because it would not be affiliated with any provider of retail services. Structural separation at the local level would bring the same benefits to local service that structural separation of long distance from local phone service brought after 1984.

In broadband, the provision of advanced connections to homes would be the responsibility of the wholesale Bell. As long as competition in advanced last-mile facilities remained weak (which we believe would be true unless new wireless technologies coupled with substantial new allocations of spectrum to broadband became available), the wholesale Bell would remain regulated. Broadband service itself—whether provided by the retail Bell or one of its rivals—would be unregulated.

The structural separation model makes it clear where the potential monopoly power resides and how to achieve the minimum amount of regulation needed for efficient economic performance. It also makes it clear that deregulation of the broadband activities of the regulated Bells is a poor idea.

Preferential regulatory treatment of the Bells' broadband operations also cannot be justified on the basis that they face adequate competition already. It is true that the Bells account for less than half of current broadband subscribers. Cable modem services have a larger share of current residential broadband services, but this does not lead to the conclusion that the Bells lack substantial market power with regard to these services. The Bells control the copper loops that are an essential input for the provision of DSL services and the Bells are the largest providers of DSL-based broadband services. We have noted earlier that cable operators, as half a duopoly structure could not be expected to be vigorous broadband rivals. Further, a competitive analysis of broadband needs to consider the total local access market for data services which remains dominated by Bell-provided leased line and other

¹³ See Robert Hall and William Lehr, *Rescuing Competition to Stimulate Economic Growth* white paper, September 2001.

data services. Indeed, it was the growth of cable modem competition and competition from entrants offering DSL services over Bell facilities that spurred the Bells to accelerate their own deployment of DSL services. The Bells were influenced by a desire to protect their substantial data service revenues from competitors—a threat of a combination of competitive facilities investment and regulatory-mandated interconnection to the Bells' networks.

Broadband represents the future of local infrastructure. Deregulating prospective broadband investment assures the sunset of open access provisions of the Telecom Act. If granted, the Bells may be able to classify nearly all of its investment opportunistically as intended for broadband data services to avoid pro-competitive unbundling and interconnection obligations. In a converged network, voice can be carried as data (Voice-over-IP services) raising the possibility that even facilities used for legacy services would avoid unbundling obligations. As increasing portions of the network become "broadband"—and hence unregulated—it will become increasingly difficult to implement unbundling and interconnection rules for the rest of the Bells' local access network.

Therefore, the market power that the Bells retain by virtue of their ownership of their legacy network is closely linked to their proposed investments in broadband and removal of pro-competitive restraints on the Bells will perpetuate their monopoly power over next-generation networks.

IV. Relaxed Regulatory Treatment for the Bells' Broadband Investment Would Increase Regulatory Uncertainty

The prospects for significant facilities-based competition are, at best, uncertain. Today, most homes are served by two facilities-based providers: the telephone company and the cable television company. With suitable upgrades, both types of networks can offer a similar range of services—at least in principle. In the future, there is hope that power line companies may upgrade their networks to support communication services or that over-builders will construct new local networks. There is also hope that some subset of the myriad wireless technologies under development may provide viable broadband local access services eventually. However, this is certainly not the case today. Indeed, during the latter half of 2001, a number of companies offering innovative wireless services either went bankrupt

(Metricom and Mobilstar) or scaled back their investments in wireless alternatives to local loops (Sprint and AT&T)

If we are lucky enough in the future to find this facilities-based competition sufficiently robust to eliminate any threat of substantial market power over last mile services, then we won't need to worry about mandating unbundling and interconnection. While this would be the best case, it is not clear that it is the most likely case. If the technology of choice for next generation access networks turns out to be fiber-to-the-home, it will almost certainly be a single-circuit natural monopoly in most local markets. Alternatively, even if both the telephone and cable TV provider survive to offer competing access in many locations, we cannot be certain at this time that the resulting duopoly competition would be suitably vigorous to obviate the need for regulatory oversight and some form of interconnection rules. The cable and telecom networks have quite different legacy networks and regulatory histories so that regulatory policy towards the two types of infrastructure ought to be distinct, at least for the time being.

There is still too much uncertainty regarding the demand for broadband-enabled services and regarding the technology for providing local access to know whether robust facilities-based competition will be viable. This uncertainty makes it premature to eliminate interconnection and unbundling regulation for future broadband services.

Although much about the future of telecommunications infrastructure is uncertain, there are a number of factors that can predictably influence future outcomes. Inappropriate regulatory policies can stifle incentives to invest. For example, regulatory policies that set the prices for interconnection below economic costs will deny firms an opportunity to earn a fair return on their investment. Under such circumstances, firms will not invest. The Telecom Act does not instruct regulators to set rates below cost, and no one has demonstrated that any of these regulated rates is below cost.

Uncertainty about regulatory policy can also dampen investment incentives. Uncertainty is especially perverse because it increases the costs of investments by both incumbents and entrants. For this reason, consistency in regulatory policy is desirable. In the context of the present debate, this would argue in favor of staying the course adopted by the Telecom Act. Repealing interconnection requirements on the Bells represents a radical change in policy.

that would dampen investors' interest in telecom. Furthermore, because it is not possible to readily segregate Bell investments into broadband and legacy infrastructure, relaxing regulatory requirements on broadband will critically weaken the unbundling provisions of the Act.

Therefore, relaxing prematurely regulatory rules on the Bells, especially with respect to their investments in broadband, would increase regulatory uncertainty and therefore would reduce incentives to invest in the infrastructure that such a policy would be intended to promote. Rather, it is maintaining the policy of unbundling that will foster investment.

V. Conclusions

Since the passage of the Telecom Act, the Bells have grown stronger through monopoly-preserving mergers and through the collapse of much of their nascent local competition. While entrants were investing heavily to get a toehold in local markets, the Bells were merging. The mergers allowed the Bells to eliminate a major source of potential facilities-based competition while at the same time expanding the geographic scope over which their market power could be coordinated and exploited. Meanwhile, the slower-than-anticipated implementation of the Act, the resistance of the Bells, and other factors resulted in the drying up of financial capital available to the CLEC industry. Without access to additional funding, many telecom startups were forced into bankruptcy.

Broadband in the United States is less widely used than in the leading countries, such as Korea. Consumers are not clamoring for broadband service because relatively few products and services are available on the Internet that make good use of high bandwidth. The short-term problem with broadband is not a lack of Bell investment, but a lack of effective competition. The Bells have been able to raise prices for broadband services in recent months, while at the same time, providing poor service. The solution is not to fence off the Bells from competition. Rather, the competitive model of the Telecom Act provides the right solution at this time. Longer-term, we do have a pressing need to achieve the economically efficient level of investment in next-generation broadband facilities. Incentives to invest will be influenced by prospects for future industry structure and regulatory uncertainty. If the Bells retain control of the technically most efficient facilities without a requirement to share those facilities with other suppliers, and if they are unregulated, they

will set high prices, serve relatively few customers at those high prices, and make relatively low investments. If, on the other hand, last-mile access is available, at prices close to cost, to many competing suppliers of broadband services, those services will be priced efficiently, demand will be high, and investment correspondingly high.

Therefore, both in the short term and longer term, prospects for investment in broadband infrastructure and services are best served if we retain the pro-competitive provisions of the Telecom Act with respect to the Bells. The appropriate time to relax unbundling requirements for specific components or services is when numerous substitute sources of supply other than the Bells become generally available. The circumstances when this condition might be met are likely to differ depending on the network element or service under consideration and on local competitive conditions. Telecom policy needs to deal with the distinct possibility that the broadband service of the future will arrive at the home over a fiber circuit with a substantial bandwidth advantage over any wireless alternative. In that case, all of the problems connected with the Bells' control of the existing copper circuit will remain. Policy should ensure a smooth path to efficient management of a potentially continuing monopoly in the last mile of the telecom network.



**BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.**

In the matter of)	
)	CC Docket No. 02-33
Appropriate Framework for Broadband)	
Access to the Internet over Wireline Facilities)	

Comments of Cinergy Communications Company

ALBERT E. CINELLI
Chairman and CEO
Cinergy Communications Company

ROBERT A. BYE
Vice President and General Counsel
Cinergy Communications Company

8833 Bond Street
Overland Park, KS 66214
(913) 492-1230

May 3, 2002

**BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.**

In the matter of)	
)	CC Docket No. 02-33
Appropriate Framework for Broadband)	
Access to the Internet over Wireline Facilities)	

COMMENTS OF CINERGY COMMUNICATIONS COMPANY

Cinergy Communications Company ("CCC") is a facilities-based Integrated Communications Provider. We offer local and long distance services and operate as an Internet Service Provider in the States of Kentucky, Indiana, and Tennessee. We also have plans to expand our territory to include Ohio, Illinois, Missouri, Mississippi and Florida. In this recessionary period, CCC is experiencing record sales and earnings, and CCC has materially increased the number of associates it employs. Our successful strategy of moderate, sustained growth based on earnings (as opposed to debt) is in jeopardy as a result of the FCC's proposed changes to Broadband policy. CCC is very concerned over the impact the proposed rule making will have on its business and its ability to continue the expansion of its business and employment.

The FCC is proposing to deregulate wireline Broadband internet services by redefining the nature of "last mile" Broadband transport from telecommunications service to information service. This proposed definitional change does not take into consideration Voice over Broadband (VoBB) technology, nor the associated jurisdictional issues. The stated objective of this rulemaking is to encourage investment in facilities to make Broadband services more widely available to the American public. For the reasons set forth in this memorandum, CCC is of the view that such deregulation will inhibit competition and result in the incumbent local exchange carriers eventually remonopolizing local voice service. Furthermore, this rulemaking is contrary to the spirit and intent of the Telecommunications Act of 1996 ("TA96").

I. Section 706 Grants State Commissions Concurrent Authority with the FCC over the Deployment of Advanced Telecommunication Services.

Section 706 (a) provides as follows:

The Commission and each State Commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and

necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

Section 706(b) goes on to require the Commission to initiate a regular notice of inquiry to determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. "If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

The Commission has recently determined that Broadband deployment is currently proceeding on a reasonable and timely basis.¹ Since the Commission's inquiry made a positive rather than negative determination, it is unclear why immediate action is necessary or even warranted under Section 706. To the extent such encouragement is necessary, the Commission is directed under 706(a) to utilize a number of methods: "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

The Commission has not attempted price cap regulation. No case has been made for forbearance, most likely because forbearance would require an analysis of the competitive effects of such action.² There has not been any suggestion of imposing measures that promote competition in the local telecommunications market. Instead of encouraging Broadband development through these statutorily authorized methods, this NPRM seeks to completely redefine the nature of "last mile" Broadband transport. This rule change would create a de facto monopoly in "last mile" Broadband transport in many areas. This result would not "promote competition in the telecommunications market" under any stretch of the imagination. In CCC's view, the FCC is free to change the direction of national policy within the confines of TA96; however, creating new law out of whole cloth is not acceptable regardless of perceived urgency of the policy goals under consideration, especially when Broadband deployment is proceeding in a reasonable and timely basis.³

¹ See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket 98-146, Third Report, Released February 6, 2002.

² In order to consider forbearance, the Commission must weigh the competitive effect of such forbearance pursuant to 47 U.S.C. § 160(b) which states:

Competitive Effect to be Weighed. In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

³ "In this Third Report, the Commission concludes its third inquiry into the availability of advanced telecommunications capability in the United States. Overall, we find that advanced telecommunications is being deployed to all Americans in a reasonable and timely manner. We are encouraged that the advanced

Section 706 grants to the "Commission and each State Commission with regulatory jurisdiction over telecommunications services" concurrent authority to promote or encourage the deployment of advanced telecommunications services. Pursuant to this section, the FCC cannot unilaterally preempt the states from exercising jurisdiction over the deployment of advanced telecommunications services. To the extent "last mile" Broadband transport is defined as an information service, the jurisdiction of State Commissions to regulate this area will be usurped. This is in direct contravention of the intent of Section 706.

Currently, CCC has arbitration cases pending before the Public Service Commission of the Commonwealth of Kentucky and before the Tennessee Regulatory Authority in which we are requesting Broadband transport as a UNE under the necessary and impair standard.⁴ We intend to deliver local and long distance services with voice over Broadband (VoBB) technologies bundled with high-speed internet access. We believe strongly that the illusive "killer application" for which Broadband proponents have been searching is voice. One cannot open up a telecommunications magazine without reading an article on IP Centrex – a VoBB service. Services such as these will afford small businesses more telephone capabilities than are currently available on expensive PBX systems that only larger companies can afford. These VoBB services will better enable small businesses to compete with large businesses by providing increased functionality at lower cost. For the residential customer, VoBB can deliver 3 or 4 voice lines each with a different calling number, plus high-speed internet access, for less than the cost of one local line and dial-up service today. This will give the residential customers several lines that could be dedicated to their children or a home office. We urge the Commission to review the attached testimony in which we demonstrate how BellSouth is squashing competition through their conduct of placing barriers to CCC's entry into the VoBB business.

Kentucky has recently indicated a desire to continue its regulation over Broadband access:

The [Kentucky] Commission notes the continuing debate regarding the extent of state and federal jurisdiction over advanced services and related Broadband telecommunications infrastructure. **We hereby advise both the FCC and**

services market continues to grow, and that the availability of and subscribership to advanced telecommunications has increased significantly. We also conclude that that although investment trends have slowed recently, investment in infrastructure for advanced telecommunications remains strong." *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket 98-146, Third Report, paragraph 1, Released February 6, 2002.

⁴ *Cinergy Communications Company – BellSouth Telecommunications, Inc. Arbitration*; Case No. 2001-432 before the Kentucky Public Service Commission. See Also *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996*; Docket No. 01-00987 before the Tennessee Regulatory Authority.

BellSouth of our plans to continue reviewing this quintessential telecommunications issue and actively pursuing a policy that promotes statewide deployment of advanced services while offering CLECs a reasonable opportunity to compete. Non-discriminatory access to the necessary network components for the provisioning of advanced services will be an ongoing focus of this Commission. We continue to hold that UNEs will prove to be an important and efficient form of competition, especially for semi-rural states like Kentucky.⁵ (emphasis supplied)

Kentucky reasonably believes that it has jurisdiction in this area and the proposed rulemaking will only commence a struggle for jurisdiction. The Florida Public Service Commission and the California Public Service Commission have both recently found inherent jurisdiction to regulate Broadband access.⁶ Other states are coming to the same conclusion and we can expect to see similar decisions in the weeks and months to come. Ultimately, the power struggle which will result from this rulemaking is not in the best interest of consumers or the economy as this issue will be tied up in the courts for years to come. The resulting uncertainty will only further constrain capital markets and prohibit competitive investment, ultimately leading to remonopolization of local voice by the Bell Operating Companies.

CCC respectfully requests that the Commission defer any action on this NPRM to let the states develop policy in this area. The "last mile" is within the jurisdiction of the states. The states, along with cities, counties and municipalities, have granted easement rights of way over their respective properties so that companies can stretch copper or fiber over the "last mile". Therefore, these entities have a proprietary interest in what is carried over these easements. Moreover, a local VoBB telephone call does not cross state lines.

Each State is different and has unique requirements to service the needs of its citizens. A uniform national requirement denies States the ability to provide for the unique needs of their respective citizens, particularly in an area where the States have a proprietary interest. What is good policy in New York may have disastrous results in Kentucky. There is no "one-size-fits-all" solution to this multifaceted problem. TA96 envisioned just such a role for the State Commissions and the Commission should continue to recognize state sovereignty in this area.

⁵ In the Matter of Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996, Advisory Opinion, Case Number 2001-00105, p. 14, April 26, 2002.

⁶ *California ISP Assoc. v. Pacific Bell and SBC Advanced Solutions* (C.01-07-027); *Petition By Florida Digital Network, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Docket No. 010098-TP

II. Voice over Broadband (VoBB) is a Telecommunications Service Subject to the Provisions of Section 251 of TA96.

Nowhere in the Wireline Broadband NPRM is reference made to VoBB. CCC has been beta testing IP Centrex, a VoBB service, for over four months and expects to deploy this product sometime in July or August of this year. This product is vastly superior to the current analog telephony used in today's businesses. It is so superior in functionality that we expect IP Centrex to eventually replace today's current analog telephony. If CLECs like CCC are denied access to unbundled elements necessary to furnish VoBB to their customers, the ILECs will eventually reestablish their monopolies over voice communications.

The Commission in the NPRM reaffirms that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive."⁷ Therefore, to the extent VoBB is a telecommunications service it cannot be an information service. Under TA96, "the term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."⁸ "Telecommunications," as defined by TA96, means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."⁹ VoBB is offered directly to our customers for a fee. Also, the voice is transmitted between points specified by the caller by dialing the connecting telephone number. The voice is transmitted in real time and neither the form nor content of the voice transmission is altered. This is in contrast to information services such as internet access in which data is manipulated by computer processors.¹⁰ Although VoBB is controlled by software, it is still a telecommunications service because the definition of information service specifically excludes computer processing for "the management of a telecommunications service."¹¹

Voice is and has always been recognized as a telecommunications service regardless of the transport mechanism. Voice is currently converted to packets in the backbone of an ATM network and reassembled for delivery. This is fundamentally no different than the packetization of voice for transport across the "last mile" as in VoBB.

The FCC has not indicated in this NPRM whether Broadband transport necessary to provide VoBB will, like internet access, be defined as an information service. CCC believes that such a tortured definition would not stand up to legal scrutiny. Moreover, the Commission would effectively be defining all voice carried across ATM networks as

⁷ Wireline Broadband NPRM, paragraph 14

⁸ 47 U.S.C. § 153(46)

⁹ 47 U.S.C. § 153(43)

¹⁰ "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and included electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

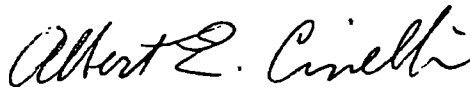
¹¹ 47 U.S.C. § 153(20)

information services. Therefore, the Commission must take VoBB into account as the exception that swallows the proposed rule.

To the extent Broadband transport becomes available for VoBB, would the FCC then propose to police this transport facility to prevent internet access? If so, does this not require more regulation and not less regulation? Also, is it good public policy to create a situation where assets cannot be used efficiently, thereby enabling the public to receive better services and more favorable prices?

Since VoBB is a telecommunications service, CLECs, including CCC, have a statutory right to avail themselves of the provisions of 251 of TA96. These rights specifically include the right to petition a State Commission for unbundled access to network elements based on an impairment in the ability to provide the telecommunications service the CLEC seeks to offer its customers.¹² The FCC cannot deprive CCC of this right by simply redefining the Broadband transport necessary for VoBB as an information service.

Respectfully submitted,



Albert E. Cinelli, Chairman and CEO
Robert A. Bye, Vice President and General Counsel

Cinergy Communications Company
8833 Bond St.
Overland Park, KS 66214
(913) 492-1230

May 3, 2002

¹²See 47 U.S.C. §251(c)(3) and 47 CFR § 51.317.

Exhibit PLH-R3

Cinergy Communications Company ADSL Business Plan
Exhibit WKM-3 Revised to account for Reality

<u>Number of Months For Rampup</u>	24					
Year by Year Summary	Yr 1	Yr 2	Yr 3	Yr 4	Yr 5	Total
New Loops - Annual	24	8	0	0	0	32
Total Loops - To-date	24	32	32	32	32	
Cash Inflows						
NRC Revenue (Business and Resi)	\$2,400	\$800	\$0	\$0	\$0	\$3,200
MRC Business Revenue 50%	\$6,236	\$14,871	\$15,350	\$15,350	\$15,350	\$67,158
MRC Residential Revenue 50%	\$3,896	\$9,291	\$9,590	\$9,590	\$9,590	\$41,958
Total Cash InFlows	\$12,532	\$24,961	\$24,941	\$24,941	\$24,941	\$112,316
Cash Outflows						
Direct Costs						
Start-up						
Collocation - Build-out	\$12,589	\$0	\$0	\$0	\$0	\$12,589
Collocation - DSLAMs	\$74,935	\$0	\$0	\$0	\$0	\$74,935
DS3 Interoffice Transport Install	\$671	\$0	\$0	\$0	\$0	\$671
Line Sharing Splitter UNE Install (96 lines) (3)	\$1,137	\$0	\$0	\$0	\$0	\$1,137
NRC						
Collocation 2-Wire Cross Connects (1st)	\$531	\$177	\$0	\$0	\$0	\$708
Collocation 2-Wire Cross Connects (addtl)	\$531	\$177	\$0	\$0	\$0	\$708
Line Share Splitter Activation UNE	\$511	\$170	\$0	\$0	\$0	\$681
MRC						
Collocation Operations	\$11,128	\$11,128	\$11,128	\$11,128	\$11,128	\$55,640
Collocation - DSLAM Maint.(Years 2-5)	\$11,240	\$11,240	\$11,240	\$11,240	\$11,240	\$56,200
Collocation 2-Wire Cross Connects	\$48	\$115	\$119	\$119	\$119	\$521
DS3 Interoffice Transport (Backhaul)	\$31,782	\$31,782	\$31,782	\$31,782	\$31,782	\$158,910
Internet Service Bus (Bandwidth & Email)	\$624	\$1,488	\$1,536	\$1,536	\$1,536	\$6,720
Internet Service Resi (Bandwidth & Email)	\$351	\$837	\$864	\$864	\$864	\$3,780
Line Sharing Splitter UNE Monthly (96 lines)	\$7,158	\$7,158	\$7,158	\$7,158	\$7,158	\$35,789
Line Share Splitter Activation UNE	\$1,159	\$2,764	\$2,853	\$2,853	\$2,853	\$12,482
Total Direct Costs	\$154,395	\$67,036	\$66,680	\$66,680	\$66,680	\$421,472
Cash Gross Margin \$	(\$141,863)	(\$42,075)	(\$41,739)	(\$41,739)	(\$41,739)	(\$309,156)
Cash Gross Margin %						-275 3%
Sales Costs						
SPIF(Based on Business MRC)	\$959	\$320	\$0	\$0	\$0	\$1,279
Marketing Costs (Based on Resi MRC)	\$1,199	\$400	\$0	\$0	\$0	\$1,598
Residual (3% Business MRC Revenue)	\$187	\$446	\$461	\$461	\$461	\$2,015
Total Sales Costs	\$2,345	\$1,166	\$461	\$461	\$461	\$4,892
Cash Contribution Margin \$	(\$144,208)	(\$43,240)	(\$42,200)	(\$42,200)	(\$42,200)	(\$314,048)
Cash Contribution Margin %						-279 6%
Operating Costs						
Provision, Proj Manage, Cust Serv, etc (Bus)	\$720	\$240	\$0	\$0	\$0	\$960
Provision, Proj Manage, Cust Serv, etc (Resi)	\$360	\$120	\$0	\$0	\$0	\$480
Total Operating Costs	\$1,080	\$360	\$0	\$0	\$0	\$1,440
Cash Operating Margin \$	(\$145,288)	(\$43,600)	(\$42,200)	(\$42,200)	(\$42,200)	(\$315,488)
Cash Operating Margin %						-280 9%
Total Cash Outflow	\$157,820	\$68,562	\$67,141	\$67,141	\$67,141	\$427,804
Net Cash Flow - Annual (Before Taxes)	(\$145,288)	(\$43,600)	(\$42,200)	(\$42,200)	(\$42,200)	(\$315,488)
Net Cash Flow - To-Date (Before Taxes)	(\$145,288)	(\$188,889)	(\$231,088)	(\$273,288)	(\$315,488)	
Valuation Results						
Internal Rate of Return (IRR)	Undetermined					
Months to Payback	Never					
Total Startup Costs	\$315,488					

Exhibit PLH-R4

Cinergy Communications Company ADSL Business Plan
Tennessee Costs, 40 Customers, \$0 00 for DSLAMs

Number of Months For Rampup:

24

Year by Year Summary

	Yr 1	Yr 2	Yr 3	Yr 4	Yr 5	Total
New Loops - Annual	24	16	0	0	0	40
Total Loops - To-date	24	40	40	40	40	
Cash Inflows						
NRC Revenue (Business and Resi)	\$4,800	\$3,200	\$0	\$0	\$0	\$8,000
MRC Business Revenue	50% \$6,236	\$16,949	\$19,188	\$19,188	\$19,188	\$80,750
MRC Residential Revenue	50% \$3,896	\$10,589	\$11,988	\$11,988	\$11,988	\$50,450
Total Cash InFlows	\$14,932	\$30,739	\$31,176	\$31,176	\$31,176	\$139,199
Cash Outflows						
Direct Costs:						
Start-up:						
Collocation - Build-out	\$9,415	\$0	\$0	\$0	\$0	\$9,415
Collocation - DSLAMs	\$1,339	\$0	\$0	\$0	\$0	\$1,339
DS3 Interoffice Transport Install	\$791	\$0	\$0	\$0	\$0	\$791
Line Sharing Splitter UNE Install (96 lines)	(3) \$450	\$0	\$0	\$0	\$0	\$450
NRC						
Collocation 2-Wire Cross Connects (1st)	\$406	\$271	\$0	\$0	\$0	\$676
Collocation 2-Wire Cross Connects (addtl)	\$406	\$271	\$0	\$0	\$0	\$676
Line Share Splitter Activation UNE	\$960	\$640	\$0	\$0	\$0	\$1,600
MRC						
Collocation Operations	\$7,705	\$7,705	\$7,705	\$7,705	\$7,705	\$38,523
Collocation - DSLAM Maint.(Years 2-5)	\$0	\$0	\$0	\$0	\$0	\$0
Collocation 2-Wire Cross Connects	\$5	\$14	\$16	\$16	\$16	\$67
DS3 Interoffice Transport (Backhaul)	\$22,061	\$22,061	\$22,061	\$22,061	\$22,061	\$110,303
Internet Service Bus (Bandwidth & Email)	\$624	\$1,696	\$1,920	\$1,920	\$1,920	\$8,080
Internet Service Resi (Bandwidth & Email)	\$351	\$954	\$1,080	\$1,080	\$1,080	\$4,545
Line Sharing Splitter UNE Monthly (96 lines)	\$3,600	\$3,600	\$3,600	\$3,600	\$3,600	\$18,000
Line Share Splitter Activation UNE	\$95	\$259	\$293	\$293	\$293	\$1,232
Total Direct Costs	\$48,207	\$37,469	\$36,674	\$36,674	\$36,674	\$195,697
Cash Gross Margin \$	(\$33,275)	(\$6,730)	(\$5,498)	(\$5,498)	(\$5,498)	(\$56,498)
Cash Gross Margin %						-40.6%
Sales Costs						
SPIF(Based on Business MRC)	\$959	\$640	\$0	\$0	\$0	\$1,599
Marketing Costs (Based on Resi MRC)	\$1,199	\$799	\$0	\$0	\$0	\$1,998
Residual (3% Business MRC Revenue)	\$187	\$508	\$576	\$576	\$576	\$2,422
Total Sales Costs	\$2,345	\$1,947	\$576	\$576	\$576	\$6,019
Cash Contribution Margin \$	(\$35,620)	(\$8,677)	(\$6,073)	(\$6,073)	(\$6,073)	(\$62,518)
Cash Contribution Margin %						-44.9%
Operating Costs						
Provision, Proj Manage, Cust Serv, etc (Bus)	\$720	\$480	\$0	\$0	\$0	\$1,200
Provision, Proj Manage, Cust Serv, etc (Resi)	\$360	\$240	\$0	\$0	\$0	\$600
Total Operating Costs	\$1,080	\$720	\$0	\$0	\$0	\$1,800
Cash Operating Margin \$	(\$36,700)	(\$9,397)	(\$6,073)	(\$6,073)	(\$6,073)	(\$64,318)
Cash Operating Margin %						-46.2%
Total Cash Outflow	\$51,632	\$40,136	\$37,249	\$37,249	\$37,249	\$203,517
Net Cash Flow - Annual (Before Taxes)	(\$36,700)	(\$9,397)	(\$6,073)	(\$6,073)	(\$6,073)	(\$64,318)
Net Cash Flow - To-Date (Before Taxes)	(\$36,700)	(\$46,097)	(\$52,171)	(\$58,244)	(\$64,318)	
Valuation Results						
Internal Rate of Return (IRR)	Undetermined					
Months to Payback	Never					
Total Startup Costs	\$64,318					

Exhibit PLH-5

From: Henry.Chow@bridge.bellsouth.com
Sent: Monday, January 14, 2002 11:37 AM
To: kdeboe@cinergycom.com
Cc: bye@cinergycom.com; Eric.Fogle@bridge.bellsouth.com;
heck@cinergycom.com; hughes@cinergycom.com; Malcom.Kemp@BellSouth.com;
mer@cinergycom.net; rachel@cinergycom.com;
Edd.Wadley2@bridge.bellsouth.com
Subject: RE: Cinergy ADSL problems

Kiki,

1. Fastaccess.com uses the same Loop qualification database that Cynergy has access to using LQS. UNE-Ps would not qualify using either tool. As Pat and I had discussed before, UNE-Ps were qualifying in error in the past and that has been corrected.

2. The telephone number 270-781-7010 qualifies in LQS and reflects that it is not a UNE-P in my assignments database. You should be able to submit an order against it as long as the CSR has been posted. If it still does not work, let me know. Thanks! -Hank

>Hank,

>

>I have a couple of more issues that I need your assistance with.

>

>1. We were previously able to qualify lines on UNEP for DSL through the LQS >and through fastaccess.com. However, as of Monday, we can no longer qualify >UNEP lines through the systems you provide.

>2. I have a customer requesting aDSL service. I placed the order to switch >the line (2707817010) from UNEP to Resale, since Bell has yet to allow aDSL >on UNEP. I tried to place the order yesterday even though the line was on >resale but the CSR had not updated. I got a response "2707817010 Not >Qualified". I assumed the problem was due to the CSR. So, the CSR updated >today on resale. However, when I tried to place the order, once again I got >a response "2707817010 Not Qualified". This line did previous qualify >through LQS and fastaccess.com. Also, it appears on the list you sent Pat >Heck as a qualified line.

>

>Please advise ASAP.

>

>Thanks,

>Kiki DeBoe

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

Re: *Petition for Interconnection by Cinergy*)
 Communications Company for Arbitration of an)
 Interconnection Agreement with BellSouth)
 Telecommunications, Inc. Pursuant to the)
 Telecommunications Act of 1996)
)
)

Docket No. 01-00987

**REBUTTAL TESTIMONY OF CHARLES FRANGOS ON BEHALF OF CINERGY
COMMUNICATIONS, INC.**

Dated: July 9, 2002

1 **Q. What is your name and business address?**

2 A. My name is Charles Frangos. My business address is 394 West Main St,
3 Suite B 14, Hendersonville, TN 37075.

4 **Q. Who do you work for?**

5 A I am the Tennessee Sales Manager of Cnergy Communications Company
6 ("Cnergy").

7 **Q. What are your responsibilities as Sales Manager of Cnergy?**

8 A. I am responsible for the production of local line, long distance, data,
9 ADSL and telephone system sales in Tennessee and Hopkinsville, KY I
10 currently have nine sales associates who report directly to me

11 **Q. Please briefly outline your educational background and related**
12 **experience.**

13 A. I graduated from Duke University with a B.A. in Psychology I have been
14 in sales and sales management for 18 years. I first started in
15 telecommunications in 1996 selling long distance for One Call
16 Communications. I started working as sales manager in Evansville, IN for
17 Telemanagement Systems (TMS) in 1997. TMS was acquired by Cnergy
18 Communications in 1999 and I became sales manager for Tennessee in
19 2000.

20 **Q. What is the purpose of your testimony today?**

1 A. To provide rebuttal testimony in Cinergy's arbitration with BellSouth here
2 in Tennessee. I will present evidence of some of the difficulties that
3 BellSouth's DSL policies have caused our salesmen.

4 **Q. On page 15 of her testimony, Ms. Cox states that where a CLEC**
5 **resells BellSouth voice service to an end user who already subscribes**
6 **to BellSouth FastAccess Internet access service or to an ISP who uses**
7 **BellSouth's wholesale ADSL service, BellSouth will continue to**
8 **provide the FastAccess and the wholesale interstate DSL transport**
9 **service. Does this statement accurately reflect your experience with**
10 **BellSouth?**

11 A. This statement sounds like it offers competition, but BellSouth is using
12 this policy as a barrier to competitive entry. It is just another piece of the
13 puzzle that BellSouth is using to maintain its market share on local voice.

14

15 My main concern today is BellSouth's Key Customer Discount Program
16 We are losing customers and potential customers to the Key Customer
17 Program because BellSouth can offer a bigger discount than we can offer
18 on the same line and then the customer is obligated to a long-term contract
19 with a termination penalty Almost all BellSouth customers are Key
20 Customers. It remains our biggest concern in the Tennessee market

21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Our second largest issue in selling local dial tone is DSL. A couple of examples will illustrate how difficult it is for a Cinergy salesman to convert a customer's voice lines from BellSouth to Cinergy when DSL is involved. Attached hereto as CFR-1 are the documents related to Blue Grass Beverages of Hendersonville, TN.

On April 17, 2002, Blue Grass signed a contract with Cinergy Communications for 5 Superlink (i.e. UNE-P) lines, long distance and voicemail for a term of 36 months. Blue Grass already had BellSouth's DSL service and placed it on the business' main line (824-6600). The customer called Bellsouth and ordered the DSL moved to the fax line (822-7517). The customer agreed to pay \$200.00 to have the DSL moved to the fax line. Ordinarily, a customer would never agree to this, but this customer was so upset with BellSouth that he was willing to pay the charge. Despite the fact that Blue Grass was willing to pay \$200 to move its DSL, it was not willing to be billed for DSL by credit card. This was the only option BellSouth provided its customer when Cinergy resold the BellSouth lines. Blue Grass refused to pay by credit card and chose to split off the fax line and keep it with BellSouth in order to avoid the hassle of a credit card.

1 because he received an issues notice from Cinergy's provisioning
2 department Cinergy was not able to provision UNE-P lines to this
3 customer because the Customer Service Records ("CSRs") were still
4 showing BellSouth ADSL on the line. In this case, the DSL was moved to
5 the fax line specifically so that the other lines could be provisioned on
6 UNE-P Instead of taking all the lines, Cinergy had to split off the fax line
7 and give it back to BellSouth. Then, BellSouth left the DSL record in its
8 CSR long after the DSL was converted which acted as a barrier to getting
9 the UNE-P lines

10
11 Steve spent many hours over the next several months attempting to get the
12 DSL off the CSR so that the lines could be converted to Cinergy On May
13 30, 2002, the DSL was finally removed from the CSR and Cinergy was
14 able to convert the lines to UNE-P. Steve estimates that he put in 10 hours
15 of time and 4 hours on the phone with BellSouth to get this single
16 customer converted For his effort, Steve earned a SPIFF in the amount of
17 \$516.00. There is no motivation for a salesman to continue to sell this
18 product because it is a lot of work for very little reward.

19
20 This is a customer that is so motivated to convert to Cinergy that he is
21 willing to spend \$200.00 to move his DSL and it still takes over a month
22 to do a conversion due to BellSouth's delay tactics. Any customer who
23

1 was not as motivated as Blue Grass would not have tolerated this apparent
2 incompetence and would have remained a BellSouth customer after their
3 patience had run out. Attached as Exhibit CFR-2 is a copy of a letter
4 written by the President of Blue Grass to Steve Baker outlining his
5 perspective on this conversion. In that letter, Blue Grass writes:

6 BellSouth made it difficult for us to communicate with them. We
7 contacted them, explained the requests for changes in simple terms,
8 answered all questions, only to be switched to another office to have
9 to communicate all of this again. Then we would be given a number
10 to call and end up back at the first office we called. . Because
11 BellSouth hindered our making these requested changes by switching
12 us around to different representatives, and by seeming not to
13 understand that we wished to switch our service to Cinergy, we had to
14 ask you to help us communicate with them. It should not have taken
15 this many calls for BellSouth to make the changes that would allow us
16 to have Cinergy as our service provider. In closing, Steve, I want to
17 thank you for assisting us through this transition, for your prompt
18 service, and for your positive attitude.

19
20 It may be impossible to prove that all these actions were intentional, but
21 the effect on Blue Grass and Cinergy was the same. The customer had to
22 pay \$200 to move DSL from the main phone line to a fax line when it
23 could have easily been placed on the fax line initially. However,
24 BellSouth knows that placing DSL on the main line makes it impossible to
25 sell UNE-P to the customer without first paying the money to move.
26 Then, even after cash is paid to move the DSL, BellSouth does not change
27 the CSR and prevents Cinergy from converting the line. If either Blue
28 Grass or Cinergy had not been so vigilant and spent so much time on the
29 phone with BellSouth, these lines would have taken much more than a

1 month to convert. This policy is designed to be a barrier to competitive
2 entry.

3
4 Steve Baker had an identical situation with Sinkers Wine and Spirits, a
5 Nashville store also owned by Mr. Sinks. Attached hereto as CFR-3 are
6 documents related to Sinkers Wine and Spirits. This location was also 5
7 voice lines and a fax line. BellSouth had placed DSL on the main number.
8 The customer had to pay \$200 to move the DSL to the fax line. Cnergy
9 then split the CSR to give the fax line back to BellSouth with DSL.
10 BellSouth did not remove the DSL on the main line from the CSR for
11 several weeks which prevented Cnergy from provisioning UNE-P. In this
12 particular case, the contract was signed on April 17, 2002 and the UNE-P
13 lines were not converted until June 5, 2002

14
15 The same issue with DSL on the main line was encountered with Marshal
16 County and Casey's Pharmacy, just to name a few more. In each instance,
17 BellSouth knows that placing the DSL on the main line would cause the
18 most disruption. The main line is the line most businesses use on business
19 cards and letterhead, and it is the first number in the hunt group. If the
20 CLEC cannot get UNE-P on that line, then it must either move the line or
21 be limited to resale. It is BellSouth's policy to limit hunting between
22 resale and UNE-P. The lines must be either all one or the other.
23 Therefore, if the CLEC wants to use UNE-P, it must find customers

1 willing to pay to have their DSL moved which is a very small market.
2 Then, even when all of these policies are followed, BellSouth makes it as
3 difficult as possible by keeping DSL on the CSR for the same line and
4 holding up the UNE-P conversion and dragging the issue out by having
5 endless loops and multiple points of contact in customer service.

6
7 Cinergy's bread and butter is the 1, 2 and 3 line customer. When these
8 customers have DSL, there is no financial case to be made to justify
9 paying to move the DSL line. These customers are unwilling to split the
10 CSR and Cinergy loses the customer. A good example is the
11 Hendersonville Chamber of Commerce. Cinergy had its long distance and
12 a good opportunity to win the local voice. This was a 3 line customer and
13 BellSouth had, of course, place DSL on the main line. The customer
14 didn't switch to Cinergy because it didn't want the hassle of moving the
15 DSL from the main line to a fax line because there wasn't enough savings
16 to justify it. Cinergy did not convert all the lines to resale because there
17 was no commission for the salesman nor any profit. Some other potential
18 customers that were lost for this same reason are Foundry Media Group,
19 Sumner County CASA, Middle Tennessee Institute of Massage and
20 Imperial Development Group.

21 **Q. Are you aware of any other competitive issues in Tennessee?**

22 A. I have heard about some problems caused by a BellSouth agent in Union
23 City, TN by the name of Gore Communications. That territory is actually

1 handled out of our Paducah, KY office; however, I am generally aware of
2 the situation. I have attached as CFR-4 a letter written to Gore
3 Communications by our General Counsel, Robert A. Bye. As you can see
4 from the letter, Gore Communications has engaged in activities intended
5 act as a barrier to competitive activity. Mr. Gore has spread rumors,
6 alleged that Cinergy is the cause of lost jobs, and even manipulated
7 equipment in order to make Cinergy look incompetent. These are just
8 some of the tactics taken by BellSouth agents that I am aware of. These
9 actions by BellSouth agents certainly are anticompetitive and constitute a
10 barrier to entry

11 **Q. Does this conclude your testimony?**

12 **A. Yes, it does.**

5/9 Blue Grass Ber. 615-824-6600 → 615-822-~~7517~~
 call-BellSouth to remove DSL from this CSR.
~~transf~~ trx to DSL Billing Dept. (John) (80min)

TechSupp. 888 321-2375 x 2 x 2 L. Lewis

→ DSL Provision. on 615-227-6527

support.fastaccess.com.

Sinkers

→ (Katie Powell)

CSR on 615-227-6527 split

Call back on ~~Friday~~ Monday 877-895-8744 ^{x2225} Clark

5/15 - split on Sinkers done but DSL still
 showing on both accounts (BlueGrass) (53 min)

5/16 DSL Dept - Conrad ^{Order} ~~Case~~ # 2384112 (45 min)
 DSL cancelled on 615-262-2300 - Conrad

5/22 DSL Dept - John ^{Order # 2405919} (Remove DSL from orig. CSR) 2405955 - ^{BlueGrass} Sinkers (48 min)

5/30 ^{888 321-2375 opt 2,4} 800-766-9115 Small Business Billing - TN (61 min)
 Elizabeth / Shannon / Rane - DSL still showing on Sinkers CSR
 back to DSL Billing. (26 min)

877-895-8744 Clark x2225



Communication Services Agreement (Form 1A)

Name <u>BlueGrass Beverages</u>	Acct # <u>1044689</u>	Form of Payment <input type="checkbox"/> ACH 1A <input type="checkbox"/> Credit Card 1B <input checked="" type="checkbox"/> Cash or Check	Invoice Delivery <input type="checkbox"/> Electronic - free w/ ACH/CC <input checked="" type="checkbox"/> Mail Invoice - \$2.95/month
Billing Address <u>555 E. Main St.</u>		Account Setup <input checked="" type="checkbox"/> Single Account <input type="checkbox"/> Multi Account	
City <u>Hendersonville</u>	State <u>TN</u> Zip <u>37075</u>	If Multi Account, this account is: <input checked="" type="checkbox"/> Parent <input type="checkbox"/> Child - Billable <input type="checkbox"/> Child - Non-Billable	
Physical Address <u>same</u>	City _____ State _____ Zip _____	If this account is child, list parent account number or parent account connection number:	
City _____ State _____ Zip _____	BTN <u>615-824-6600</u> County <u>SUMNER</u>		
Contact Name <u>Bill Sinks</u>	1 st Contact # <u>615-824-6680</u>		
Fax # <u>615-822-7517</u>	2 nd Contact # _____		
Email <u>BillSinks@bluegrassbeverages.com</u>	Fed ID <u>62-1218679</u>		
If Corp, Owner's Name <u>Bill Sinks</u>	D&B/SS# <u>415-92-2858</u>	Tax Exempt <input type="checkbox"/> Federal <input type="checkbox"/> State (Include certificate)	

Long Distance	Contract Term	Switched IntraLata Rate	Switched InterLata Rate	Dedicated IntraLata Rate	Dedicated InterLata Rate	Minimum Monthly Commitment
One Plus 2A, 1A	<u>36 mo.</u>	<u>.065</u>	<u>.065</u>			
Toll Free 2A 4B						
Calling Card 2A	<u>36 mo.</u>	Calling Card Rate <u>.135</u>	Number of Cards <u>2</u>			
VOICE 2A		VOICE Recurring	Per Min. Rate	Number of Access Lines		

Local Telephone Service			Contract Term	Non Recurring	Recurring
<input checked="" type="checkbox"/> Superlink 2A, 2B	<input type="checkbox"/> Superlink Plus 3A, 3C	Number of Lines <u>5</u>	<u>36 mo.</u>		
Inside Wiring	CCC provide <input type="checkbox"/> Yes <input type="checkbox"/> No				
Equipment 1A	<input type="checkbox"/> Rent <input type="checkbox"/> Buy				

Internet		Contract Term	Non Recurring	Recurring
Web/Application Hosting 7A				
Internet Access 7A	<input type="checkbox"/> POTS <input type="checkbox"/> ISDN <input type="checkbox"/> T1 (Bandwidth _____ CIR _____)			
CleanMail 7A	<input type="checkbox"/> Virus Filtering <input type="checkbox"/> Spam Filtering			
Equipment 1A	<input type="checkbox"/> Rent <input type="checkbox"/> Buy			

Voice Mail		Contract Term	Non Recurring	Recurring
Number of Voice Mail Boxes <u>1</u> 2A	Transfer Mailbox <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<u>36 mo.</u>		

Private Lines		Contract Term	Non Recurring	Recurring
Circuit 1A, 3C	<input type="checkbox"/> T1 <input type="checkbox"/> 64K <input type="checkbox"/> 56K <input type="checkbox"/> Other _____ DCS <input type="checkbox"/> Yes <input type="checkbox"/> No			
Equipment 1A	<input type="checkbox"/> Rent <input type="checkbox"/> Buy			

How did you hear about us? If word of mouth, who referred you?

Sales Rep Name <u>STEVE BAKER</u>	BillPlex ID <u>1887</u>	<input checked="" type="checkbox"/> direct <input type="checkbox"/> agent <input type="checkbox"/> reseller <input type="checkbox"/> house
Account Manager	Sales Engineer	

Letter of Agency

Revised 2-18-02

Customer hereby appoints Cinergy Communications Company ("CCC") as agent in all matters relating to Customer's long distance and/or local service, to the extent those services are selected by Customer as indicated above. CCC is authorized to contact Customer's local telephone company to activate this service immediately. Customer understands that it may designate only one long distance carrier per telephone line. Customer agree to pay all charges incurred on this account, including Internet access, local, long distance, toll free and calling card calls, taxes, tax-like charges, other surcharges, all FCC imposed or authorized charges and charges for access and access related charges. Customer is authorized to execute this agreement and acknowledges by signature that Customer has read, understands and agrees with all the terms and conditions contained within this Agreement. Customer agrees to the terms and conditions contained on the reverse side of this Agreement, as well as CCC's tariffs which may be modified by CCC from time to time and thereby affect the services furnished to Customer. The terms and conditions set forth in such tariffs shall supplement or, to the extent inconsistent, supersede the terms and conditions of this Agreement. Customer understands CCC may use a credit-reporting agency.

I HAVE READ AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS AGREEMENT.

Print Customer Name William R Sinks Jr. Signature [Signature]
 If Business, Title of Signer President Date 4/17/02

Cinergy Communications Company
Communication Services Agreement – Terms and Conditions

1. Payment and Billing.
 - a. Customer is responsible for payment of all charges for services furnished to Customer hereunder.
 - b. Monthly charges shall be due and payable by Customer upon receipt of Cinergy Communications Company's ("CCC") invoice. ACH customers will be debited 15 days following the mailing or emailing of an invoice. Credit Card customers will be charged within 24 hours following the mailing or emailing of an invoice. Payment shall be made to CCC at the address set forth on the invoice. All charges and amounts payable hereunder shall be payable without set-off or abatement. Any disputes must be communicated to CCC in writing within fifteen (15) days of receipt of CCC's invoice and submitted with full payment. If a credit is determined to be warranted, CCC will issue the credit to Customer on a subsequent invoice.
 - c. A late payment charge of .05% per day (.1% per day in Indiana), not to exceed the highest rate allowed by law, shall be charged on any amount not paid within twenty-one (21) days of the invoice date.
 - d. Taxes, tax-like charges and other local, state or federally charged, imposed or authorized fees, charges and surcharges are not built into CCC's rates, and therefore, will be included on Customer's invoice. Customer agrees to pay all such amounts.
 - e. CCC reserves the right to require payment of a security deposit at any time, to secure payment of Customer's charges, which deposit shall be returned to Customer in full within thirty (30) days of the termination of this Agreement, subject to Customer making full and final payment for all charges incurred hereunder.
 - f. A \$25.00 service charge shall be added to all returned checks and all items submitted for direct payment (ACH) for which there is insufficient funds.
 - g. In the event Customer fails to pay all amounts which become due, including sums due under section 6, Customer, in addition to all other payments due to CCC hereunder, agrees to pay all costs associated with the collection of past due amounts, including court costs, collection agency fees, attorney fees and other costs.
2. Enforceability. This Agreement is not valid and enforceable unless accepted and/or provisioned by CCC.
3. Term. The initial term shall be as indicated on Form 1A. Upon the expiration of the initial term, this Agreement shall be renewed upon the same terms and conditions for successive twelve (12) month terms without further action by the parties, but may be terminated at the end of any twelve (12) month period by either of the parties hereto by the delivery of written notice not less than thirty (30) days prior to the expiration of any twelve (12) month period.
4. Satisfaction Guarantee. If, within ninety (90) days from the date of execution of this Agreement, Customer is not completely satisfied with the service level provided by Cinergy Communications Company in accordance with this Agreement, including notice and opportunity to cure, Customer may terminate and CCC will switch Customer back to the former carrier, upon written request, at no cost to Customer.
5. Termination by CCC. Notwithstanding anything to the contrary contained in this Agreement, CCC may discontinue services or terminate this Agreement for any of the following reasons: (i) Customer fails to pay any invoice within twenty-one (21) days from the due date of such invoice, provided CCC gives Customer notice and an opportunity to cure its payment default within three (3) business days of such notice, (ii) Regulatory or other governmental actions which adversely affect the cost of providing service; (iii) Customer furnishes false or misleading customer information; or (iv) Customer fails, in CCC's sole discretion, to maintain satisfactory credit qualifications.
6. Termination by Customer. Customer shall have the right to terminate this Agreement if CCC is in material breach of any condition and fails to cure such material breach within seven (7) business days of receipt of written notice thereof. In the event Customer terminates this Agreement prior to its expiration, other than as a result of CCC's material breach, or CCC terminates this Agreement for Customer's breach (including nonpayment), Customer agrees to pay CCC as liquidated damages a termination charge calculated as follows: sixty percent (60%) of Customer's average monthly charges hereunder multiplied by the number of months remaining in the term. Customer expressly acknowledges that in the event of an unauthorized termination of this Agreement, the anticipated loss to CCC in such event is estimated to be the amount set forth in the foregoing termination charge provision and such estimated value is reasonable and is not imposed as a penalty.
7. Limitation of Liability. CCC MAKES NO WARRANTIES, EITHER EXPRESS, IMPLIED OR STATUTORY, REGARDING THE SERVICES PROVIDED HEREUNDER, AND EXPRESSLY DISCLAIMS ALL WARRANTIES, INCLUDING WITHOUT LIMITATION, THOSE OF NONINFRINGEMENT, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE. CUSTOMER AGREES THAT DAMAGES ARISING HEREUNDER SHALL BE LIMITED TO THE AMOUNT ACTUALLY PAID BY CUSTOMER FOR SERVICES AND IN NO EVENT SHALL CCC BE LIABLE TO CUSTOMER FOR DAMAGES OF ANY KIND INCLUDING INCIDENTAL, CONSEQUENTIAL, INDIRECT, DIRECT, SPECIAL OR PUNITIVE DAMAGES.
8. Adjustments. During the term of this Agreement CCC may, for regulatory reasons which adversely affect the cost of providing service, increase the rates charged to Customer hereunder or delete or modify services provided hereunder or pass through to Customer all, or a portion of, any charges or surcharges directly or indirectly related to such regulatory activity. If a rate increase is instituted by CCC for other than regulatory reasons, Customer may terminate without penalty if CCC receives written notice of termination within thirty (30) days of the date that the rate increase takes effect. All services added by Customer during the term of this Agreement shall be incorporated into this Agreement and become subject to these Terms and Conditions.
9. Minimum Monthly Commitment. Customer agrees to the Minimum Monthly Commitment indicated on Form 1A, if applicable. Customer commits that the number of minutes it incurs during each monthly billing cycle will equal or exceed the amount of the commitment. If Customer fails to meet the minimum number of minutes in a month, then Customer will pay a Shortfall Charge equal to the difference in the number of minutes in this commitment and the number of minutes actually incurred multiplied by the per minute rate indicated.
10. General. This Agreement represents the entire understanding and agreement between the parties hereto and supersedes any and all prior agreements, whether written or oral, that may exist between the parties. No change, alteration or amendment of the terms or conditions of this Agreement are authorized or effective unless they have been agreed to in writing by an officer of CCC. This Agreement is a legally binding contract on the part of both CCC and Customer and shall remain binding and inure to the benefit of their respective principals, successors in interest, and assigns in accordance with the Terms and Conditions.

Customer Initials 

Bowling Green, KY: 1148 College Street, 270.842.8227 • Clarksville, TN: 1788 Wilma Rudolph Blvd, 891.553.0024
 Evansville, IN: 1419 W Lloyd Expressway, 812.464.8964 • Hendersonville, TN: 394 West Main, #B14, 615.264.4592
 Hopkinsville, KY: 204 East Ninth Street, 270.887.9724 • Louisville, KY: 200 High Rise Drive, #373, 502.400.6200
 Madisonville, KY: 54 W. Lake Street, 270.821.7868 • Owensboro, KY: 1001 Frederica Street, 270.685.1822
 Paducah, KY: 1515 Broadway, 270.443.6302

BillPlex WebWizard

USER: sbaker (qcc1)

Main Menu :: Provisioning :: CSR Lookup**Data for 615 824-6600**

(new_query)

- Products and Services
- Customer Service Record - SERVICE AND EQUIP
- Customer Service Record - DIR/TFC/BILL
- Customer Service Record - HUNTING LIST

Products and Services

(return to top)

*Original
CSR*

Transaction Successful. (0239)

615 824 6600 327

BLUEGRASS BEVERGS
555 E MAIN ST
HENDERSNVL, TN 37075 2622

Number	Item	***** BELLSOUTH *****
1	ADL11	-ADSL Virtual Circuit with Data Rates up to 1.5 Mbps
4	BCR	-Call Return Blocking
4	BRD	-Repeat Dial Blocking
1	CPERN	-Customer owned connection equipment
3	CREX4	-Custom Toll Restriction
1	ESCWT	-Three-way Calling with Transfer
1	FAL	-Foreign directory listing
5	FUJMX	-Federal Universal Service Charge
1	GCE	-Call Forwarding Busy Line
1	GCJRC	-Call Forwarding Don't Answer Ring Control
2	HTG	-Hunting/Rollover Service
5	LNPCX	-FCC Local Number Portability Line Charge - Line
1	MPMXX	-MemoryCall Answering Service, Personal/Extension M
1	MWW	-Message Waiting - Stutter Dialtone
1	NW1	-Network interface-inside, flush
5	TTB	-Touch-Tone
5	1FB	-Business Line
3	1LS11	-Mileage - Zone
1	888	-IAS-type 1, pipe-cross reference of line separately
5	9ZR	-FCC Charge for Network Access

Customer Service Record - SERVICE AND EQUIP

(return to top)

All data available for this CSR has been displayed. (9010)

---S&E

HTG A 6600, 6602

(OTHER)

1 NW1 Network interface-inside, flush
/TN 615 824-0546/SED 12-14-95
/ZSER 3C10000001

(CHARGEABLE LISTINGS)

1 FAL Foreign directory listing
/REF E/SED 10-13-94
/ZSER 4310000002

(LINES & STATIONS)

1 BCR Call Return Blocking
/TN 615 822-0218/SED 07-22-98
/ZSER 881000001B

1 BRD Repeat Dial Blocking
/TN 615 822-0218/SED 07-22-98
/ZSER 8F1000001C

1 1FB ~~Business Line~~
/TN 615 822-0219/PIC 0288
/LPIC 0222/ZNB
/PCA SR, 12-20-96
/SED 11-08-96/ZSER 4A10000003
/BLKD ORG/RCU TWC
/LPCA GB, 10-08-01

1 TTB Touch-Tone
/TN 615 822-0219/SED 08-06-96
/ZSER 5110000004

1 FUJMX Federal Universal Service Charge
/TN 615 822-0219/SED 07-01-00
/ZSER 4710000030

1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 822-0219/SED 05-15-99
/ZSER 8E1000002B

1 9ZR FCC Charge for Network Access
/TN 615 822-0219/SED 08-06-96
/ZSER 5810000005

1 888 IAS-type 1, pipe-cross reference of line separately billed, no rate
/TN 615 822-2000
/ZSER 5F10000006

1 1FB ~~Business Line~~
/TN 615 824-0546/PIC 0222
/LPIC 0222/BLKD ORG
/PCA CP, 02-12-97/ZNB
/SED 11-08-96/ZSER 6610000007
/RCU TWC/LPCA GB, 10-18-01

1 TTB Touch-Tone
/TN 615 824-0546/SED 12-14-95
/ZSER 6D10000008

1 BCR Call Return Blocking
/TN 615 824-0546/SED 07-22-98
/ZSER 961000001D

1 BRD Repeat Dial Blocking
/TN 615 824-0546/SED 07-22-98

BillPlex WebWizard CSR Lookup

Page 3 of 5

/ZSER 9D1000001E
1 FUJMX Federal Universal Service Charge
/TN 615 824-0546/SED 07-01-00
/ZSER 4E10000031
1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 824-0546/SED 05-15-99
/ZSER 951000002C
1 9ZR FCC Charge for Network Access
/TN 615 824-0546/SED 12-14-95
/ZSER 7410000009
1 1FB ~~Business Line~~ ✓
/TN 615 824-6600/PIC 0222
/LPIC 0222/BLKD ORG/NMC
/ZSER 7B1000000A
/LPCA GB, 10-08-01
/RMKR (A)/TTBROTATINGLOOPSTART
/PCA CP, 02-12-97/RCU TWC
/GF ADSL/PSM .ARDT/SSM
/TTRA 615 824/EXK 615 824
/LRN 6158240000
1 ADL11 ADSL Virtual Circuit with Data Rates up to 1.5 Mbps Downstream and up to
/TN 615 824-6600
/RCID T4.HFGJ.702653..SC
/VPI 14, VCI 1021
/RVPI 8, RVCI 35
/WW 901 M71-2484/SED 09-19-01
/ZSER 6A10000035
1 BCR Call Return Blocking
/TN 615 824-6600/SED 07-22-98
/ZSER A41000001F
1 BRD Repeat Dial Blocking
/TN 615 824-6600/SED 07-22-98
/ZSER 4110000020
1 CREX4 Custom Toll Restriction
/TN 615 824-6600
/ZSER 821000000B
1 FUJMX Federal Universal Service Charge
/TN 615 824-6600
/ZSER 5510000032/SED 07-01-00
1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 824-6600/SED 05-15-99
/ZSER 9C1000002D
1 9ZR FCC Charge for Network Access
/TN 615 824-6600
/ZSER 891000000C
1 TTB Touch-Tone
/ZSER 901000000D
2 1LS11 Mileage - Zone
/ZSER 971000000E
2 HTG Hunting/Rollover Service
/ZSER 9E1000000F
1 1FB ~~Business Line~~ ✓
/TN 615 824-6600/PIC 0222
/LPIC 0222/BLKD ORG
/PCA CP, 02-12-97
/ZSER 3B10000010/RCU TWC
/LPCA GB, 10-18-01
/RMKR (A)
TTBROTATINGLOOPSTART
1 TTB Touch-Tone

ordered moved to 615-822-7517 on separate CSR
Done

BillPlex WebWizard CSR Lookup

Page 4 of 5

/TN 615 824-6602
/ZSER 4210000011
1 CREX4 Custom Toll Restriction
/TN 615 824-6602
/ZSER 4910000012
1 FUJMX Federal Universal Service Charge
/TN 615 824-6602
/ZSER 5C10000033/SED 07-01-00
1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 824-6602/SED 05-15-99
/ZSER A31000002E
1 9ZR FCC Charge for Network Access
/TN 615 824-6602
/ZSER 5010000013
1 1FB Business Line ✓
/TN 615 824-6680/PIC 0222
/LPIC 0222/BLKO ORG/ZNB
/PCA GB, 02-27-01
/SED 07-12-97/ZSER 5D10000024
/LPCA GB, 02-27-01
1 TTB Touch-Tone
/TN 615 824-6680/SED 07-12-97
/ZSER 5E10000015
1 1LS11 Mileage - Zone
/TN 615 824-6680/SED 07-12-97
/ZSER 6510000016
1 MPMXX Memory Call Answering Service, Personal/Extension Mailbox ✓
/TN 615 824-6680 ✓
/MBTN 615 824-6680
/DLNM 1-BLUEGRASS BEVERAGES
/SED 09-28-98/ZSER 6410000025
1 BCR Call Return Blocking
/TN 615 824-6680/SED 07-22-98
/ZSER 4F10000022
1 BRD Repeat Dial Blocking
/TN 615 824-6680/SED 07-22-98
/ZSER 5610000023
1 CREX4 Custom Toll Restriction
/TN 615 824-6680/CBK B
/SED 07-12-97/ZSER 6C10000017
1 ESCWT Three-Way Calling with Transfer
/TN 615 824-6680/SED 09-28-98
/ZSER 6B10000026
1 FUJMX Federal Universal Service Charge
/TN 615 824-6680/SED 07-01-00
/ZSER 6310000034
1 GCE Call Forwarding Busy Line
/TN 615 824-6680/SED 09-28-98
/ZSER 7210000027
1 GCJRC Call Forwarding Don't Answer Ring Control
/TN 615 824-6680/SED 09-28-98
/ZSER 7910000028
1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 824-6680/SED 05-15-99
/ZSER AA1000002F
1 MWW Message Waiting - Stutter Dialtone
/TN 615 824-6680/SED 09-28-98
/ZSER 871000002A
1 9ZR FCC Charge for Network Access
/TN 615 824-6680/SED 07-12-97

BillPlex WebWizard CSR Lookup

Page 5 of 5

/ZSER 7310000018
1 CPERN Customer owned connection equipment
/EN AY589N62548KFE-3.2B
/ZSER 7A10000019/RMKR (A)

Customer Service Record - DIR/TFC/BILL[\(return to top\)](#)

All data available for this CSR has been displayed. (9010)

---DIR

DDA BLUE GRASS BEVERAGES
555 E MAIN ST
HENDRSNVL TN 37075
DEL A5, B5, C5

---BILL

BN1 BLUEGRASS BEVERGS
BA2 555 E MAIN ST
PO HENDERSNVL TN 37075

Customer Service Record - HUNTING LIST[\(return to top\)](#)

All data available for this CSR has been displayed. (9010)

HTG A 6600, 6602
2 HTG Hunting/Rollover Service
/ZSER 9E1000000F

BillPlex WebWizard

USER: sbaker (qcc1)

Main Menu :: Provisioning :: CSR Lookup

Data for 615 822-7517

(new query)

- Products and Services
- Customer Service Record

Products and Services

(return to top)

Transaction Successful. (0239)

615 822 7517 165

*NEW DSL on
STAYING w/ BELL.*

BLUEGRASS BEVERAGES
555 MAIN STREET
HENDERSNV, TN 37075

Number

Item

***** BELLSOUTH *****

1	ADL11 -ADSL Virtual Circuit with Data Rates up to 1.5 Mbps
1	FUJMX -Federal Universal Service Charge
1	LNPCX -FCC Local Number Portability Line Charge - Line
1	NP3 -Listing-not in directory or directory assistance
1	TTB -Touch-Tone
1	1FB -Business Line
1	9ZR -FCC Charge for Network Access

Customer Service Record

(return to top)

All data available for this CSR has been displayed. (9010)

ACCT 615 822-7517 165

EXCH HDVL
BCS 1FB
STAT OPEN
TYPE BUSINESS
SVCC 21
EQIND1 7
LAST2SER 268435463
DISCDATE
MULTLINE 1
HTGRMLCT 0
JOINTIND
JAZZIND
BREFIND

DENVIND 0
BMIHTIND
SENSACCT 0
TTRA 615 824
CENT S10

---LIST

NP (NON-PUB) BLUEGRASS; WINES &
LIQUORS
/DGN NONE
LA 555 E MAIN ST
SA 555 E MAIN ST, HENDERSONVILLE
DZIP 37075
XPH 999001
NONE
SIC 5921
ZAEC XXXXX

---DIR

DDA LA
DEL A0, B0, C0

---BILL

BN1 BLUEGRASS BEVERAGES
BA2 555 MAIN STREET
PO HENDERSNVL TN 37075

---S&E

(CHARGEABLE LISTINGS)

1 NP3 Listing-not in directory or directory assistance
/ZSER 3C10000001

(LINES & STATIONS)

1 lFB Business Line
/TN 615 822-7517/PIC 0222
/LPIC 0222/PCA CP, 02-12-97
/ZNB/SED 06-14-89
/ZSER 4310000002
/LPCA GB, 10-18-01
/RMKR (A) FAX LINE USE
/GF ADSL/PSM .ARDT/SSM
/TTRA 615 824/EXK 615 824
/LRN 6158240000
1 TTB Touch-Tone
/TN 615 822-7517/SED 06-14-89
/ZSER 4A10000003
1 ADL11 ADSL Virtual Circuit with Data Rates up to 1.5 Mbps Downstream and up to
/TN 615 822-7517
/RCID T4.HFGJ.696470..SC
/VPI 14, VCI 714
/RVPI 8, RVCI 35
/WW 901 M71-2484/SED 04-24-02
/ZSER 6610000007

BillPlex WebWizard CSR Lookup

1 FUJMX Federal Universal Service Charge
/TN 615 822-7517/SED 07-01-00
/ZSER 5F10000006
1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 822-7517/SED 05-15-99
/ZSER 5810000005
1 9ZR FCC Charge for Network Access
/TN 615 822-7517/SED 06-14-89
/ZSER 5110000004

BillPlex WebWizard

USER: sbaker (qcc1)

Main Menu :: Provisioning :: CSR Lookup

Data for 615 824-6600

(new query)

- Products and Services
- Customer Service Record - SERVICE AND EQUIP
- Customer Service Record - DIR/TFG/BILL
- Customer Service Record - HUNTING LIST
- Customer Service Record - IDENT/LIST

Products and Services

(return to top)

Transaction Successful. (0239)

615 824 6600 327

NEW CSR w/ DSL
FINALLY REMOVED

BLUEGRASS BEVERGS
555 E MAIN ST
HENDERSNVL, TN 37075 2622

Number	Item	***** BELLSOUTH *****
4	BCR -Call Return Blocking	
4	BRD -Repeat Dial Blocking	
1	CPERN -Customer owned connection equipment	
3	CREX4 -Custom Toll Restriction	
1	ESCWT -Three-Way Calling with Transfer	
1	FAL -Foreign directory listing	
5	FUJMX -Federal Universal Service Charge	
1	GCE -Call Forwarding Busy Line	
1	GCJRC -Call Forwarding Don't Answer Ring Control	
2	HTG -Hunting/Rollover Service	
5	LNPCX -FCC Local Number Portability Line Charge - Line	
1	MPMXX -MemoryCall Answering Service, Personal/Extension Me	
1	MWW -Message Waiting - Stutter Dialtone	
1	NW1 -Network interface-inside, flush	
5	TTB -Touch-Tone	
5	1FB -Business Line	
3	1LS11 -Mileage - Zone	
1	888 -IAS-type 1, pipe-cross reference of line separately	
5	9ZR -FCC Charge for Network Access	

Customer Service Record - SERVICE AND EQUIP

(return to top)

All data available for this CSR has been displayed. (9010)

---S&E

HTG A 6600, 6602

(OTHER)

1 NW1 Network interface-inside, flush
/TN 615 824-0546/SED 12-14-95
/ZSER 3C10000001

(CHARGEABLE LISTINGS)

1 FAL Foreign directory listing
/REF E/SED 10-13-94
/ZSER 4310000002

(LINES & STATIONS)

1 BCR Call Return Blocking
/TN 615 822-0218/SED 07-22-98
/ZSER 881000001B

1 BRD Repeat Dial Blocking
/TN 615 822-0218/SED 07-22-98
/ZSER 8F1000001C

1 1FB Business Line
/TN 615 822-0219/PIC 0288
/LPIC 0222/ZNB
/PCA SR, 12-20-96
/SED 11-08-96/ZSER 4A10000003
/BLKD ORG/RCU TWC
/LPCA GB, 10-08-01

1 TTB Touch-Tone
/TN 615 822-0219/SED 08-06-96
/ZSER 5110000004

1 FUJMX Federal Universal Service Charge
/TN 615 822-0219/SED 07-01-00
/ZSER 4710000030

1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 822-0219/SED 05-15-99
/ZSER 8E1000002B

1 9ZR FCC Charge for Network Access
/TN 615 822-0219/SED 08-06-96
/ZSER 5810000005

1 888 IAS-type 1, pipe-cross reference of line separately billed, no rate
/TN 615 822-2000
/ZSER 5F10000006

1 1FB Business Line
/TN 615 824-0546/PIC 0222
/LPIC 0222/BLKD ORG
/PCA CP, 02-12-97/ZNB
/SED 11-08-96/ZSER 6610000007
/RCU TWC/LPCA GB, 10-18-01

1 TTB Touch-Tone
/TN 615 824-0546/SED 12-14-95
/ZSER 6D10000008

1 BCR Call Return Blocking
/TN 615 824-0546/SED 07-22-98
/ZSER 961000001D

1 BRD Repeat Dial Blocking
/TN 615 824-0546/SED 07-22-98

/ZSER 9D1000001E
1 FUJMX Federal Universal Service Charge
/TN 615 824-0546/SED 07-01-00
/ZSER 4E10000031
1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 824-0546/SED 05-15-99
/ZSER 951000002C
1 9ZR FCC Charge for Network Access
/TN 615 824-0546/SED 12-14-95
/ZSER 7410000009
1 1FB Business Line
/TN 615 824-6600/PIC 0222
/LPIC 0222/BLKD ORG/NMC
/ZSER 7B1000000A
/LPCA GB, 10-08-01
/RMKR (A)TTBROTATINGLOOPSTART
/PCA CP, 02-12-97/RCU TWC
/TTRA 615 824/EXK 615 824
/LRN 6158240000
1 BCR Call Return Blocking
/TN 615 824-6600/SED 07-22-98
/ZSER A41000001F
1 BRD Repeat Dial Blocking
/TN 615 824-6600/SED 07-22-98
/ZSER 4110000020
1 CREX4 Custom Toll Restriction
/TN 615 824-6600
/ZSER 821000000B
1 FUJMX Federal Universal Service Charge
/TN 615 824-6600
/ZSER 5510000032/SED 07-01-00
1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 824-6600/SED 05-15-99
/ZSER 9C1000002D
1 9ZR FCC Charge for Network Access
/TN 615 824-6600
/ZSER 891000000C
1 TTB Touch-Tone
/ZSER 901000000D
2 1LS11 Mileage - Zone
/ZSER 971000000E
2 HTG Hunting/Rollover Service
/ZSER 9E1000000F
1 1FB Business Line
/TN 615 824-6602/PIC 0222
/LPIC 0222/BLKD ORG
/PCA CP, 02-12-97
/ZSER 3B10000010/RCU TWC
/LPCA GB, 10-18-01
/RMKR (A)
TTBROTATINGLOOPSTART
1 TTB Touch-Tone
/TN 615 824-6602
/ZSER 4210000011
1 CREX4 Custom Toll Restriction
/TN 615 824-6602
/ZSER 4910000012
1 FUJMX Federal Universal Service Charge
/TN 615 824-6602
/ZSER 5C10000033/SED 07-01-00

1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 824-6602/SED 05-15-99
/ZSER A31000002E

1 9ZR FCC Charge for Network Access
/TN 615 824-6602
/ZSER 5010000013

1 1FB Business Line
/TN 615 824-6680/PIC 0222
/LPIC 0222/BLKD ORG/ZNB
/PCA GB, 02-27-01
/SED 07-12-97/ZSER 5D10000024
/LPCA GB, 02-27-01

1 TTB Touch-Tone
/TN 615 824-6680/SED 07-12-97
/ZSER 5E10000015

1 ILS11 Mileage - Zone
/TN 615 824-6680/SED 07-12-97
/ZSER 6510000016

1 MPMXX MemoryCall Answering Service, Personal/Extension Mailbox
/TN 615 824-6680
/MBTN 615 824-6680
/DLNM 1-BLUEGRASS BEVERAGES
/SED 09-28-98/ZSER 6410000025

1 BCR Call Return Blocking
/TN 615 824-6680/SED 07-22-98
/ZSER 4F10000022

1 BRD Repeat Dial Blocking
/TN 615 824-6680/SED 07-22-98
/ZSER 5610000023

1 CREX4 Custom Toll Restriction
/TN 615 824-6680/CBK B
/SED 07-12-97/ZSER 6C10000017

1 ESCWT Three-Way Calling with Transfer
/TN 615 824-6680/SED 09-28-98
/ZSER 6B10000026

1 FUJMX Federal Universal Service Charge
/TN 615 824-6680/SED 07-01-00
/ZSER 6310000034

1 GCE Call Forwarding Busy Line
/TN 615 824-6680/SED 09-28-98
/ZSER 7210000027

1 GCJRC Call Forwarding Don't Answer Ring Control
/TN 615 824-6680/SED 09-28-98
/ZSER 7910000028

1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 824-6680/SED 05-15-99
/ZSER AA1000002F

1 MWW Message Waiting - Stutter Dialtone
/TN 615 824-6680/SED 09-28-98
/ZSER 871000002A

1 9ZR FCC Charge for Network Access
/TN 615 824-6680/SED 07-12-97
/ZSER 7310000018

1 CPERN Customer owned connection equipment
/EN AY589N62548KFE-3.2B
/ZSER 7A10000019/RMKR (A)

Customer Service Record - DIR/TFC/BILL

(return to top)

All data available for this CSR has been displayed. (9010)

---DIR

DDA BLUE GRASS BEVERAGES
555 E MAIN ST
HENDRSNVL TN 37075
DEL A5, B5, C5

---BILL

BN1 BLUEGRASS BEVERGS
BA2 555 E MAIN ST
PO HENDERSNVL TN 37075

Customer Service Record - HUNTING LIST

(return to top)

All data available for this CSR has been displayed. (9010)

HTG A 6600, 6602
2 HTG Hunting/Rollover Service
/ZSER 9E1000000F

Customer Service Record - IDENT/LIST

(return to top)

All data available for this CSR has been displayed. (9010)

ACCT 615 824-6600 327

EXCH HDVL
BCS 1FB
STAT OPEN
TYPE BUSINESS
SVCC 21
EQIND1 49
LASTZSER 268435509
DISCDATE
MULTLINE 5
HTGHMLCT 1
JOINTIND
JAZZIND
BREFIND
DENYIND 0
BMITIND
SENSACCT 0
TTRA 615 824

CENT S10

---LIST

LN BLUEGRASS; BEVERAGES-- (PRE)
(1) WINE & SPIRITS
LA 555 E MAIN ST
SA 555 E MAIN ST
, HENDERSONVILLE
DZIP 37075
YPH 067210
LIQUOR STORES
SIC 5921
ZAEC XXXXX
FL (E) BLUEGRASS; BEVERAGES--
(PRE)
(1) WINE & SPIRITS
/LA 555 E MAIN ST
HENDERSONVILLE
/TN 615 824-6600
/FDN GALLATIN, TN



BLUEGRASS BEVERAGES



wine and spirits

To: Steve Baker
Cinergy Communications
(615) 264-4557

From: Bill Sinks, Jr.
Date: 6/25/02
Re: Telephone Service

Dear Steve,

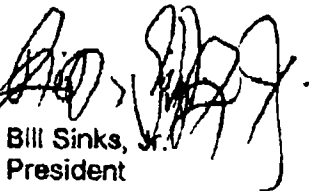
As a follow-up report to you on our phone service, we notice that Bell South has finally been making the changes that will allow us to change our service from Bell South to Cinergy. We feel that these requests for changes were hampered by Bell South's lack of good customer service in this matter.

Bell South made it difficult for us to communicate with them. We contacted them, explained the requests for changes in simple terms, answered all questions, only to be switched to another office to have to communicate all of this again. Then we would be given a number to call and end up back at the first office we called. We had to place numerous calls to accomplish canceling Bell South as our telephone service provider. On some instances, our calls were answered by a Bell South customer service representative who spoke with heavily accented English, and who seemed to have difficulties in understanding our spoken English.

Because Bell South hindered our making these requested changes by switching us around to different representatives, and by seeming to not understand that we wished to switch our service to Cinergy, we had to ask you to help us communicate with them. It should not have taken this many calls for Bell South to make the changes that would allow us to have Cinergy as our service provider.

In closing, Steve, I want to thank you for assisting us through this transition, for your prompt service, and for your positive attitude.

Sincerely,



Bill Sinks, Jr.
President

CFR-3

CINERGY

COMMUNICATIONS

Communication Services Agreement (Form 1A)

Name <u>Sinkers Wine & Spirits</u>	Acct # <u>1044693</u>	Form of Payment: <input type="checkbox"/> ACH 1B <input type="checkbox"/> Credit Card 1B <input checked="" type="checkbox"/> Cash or Check	Invoice Delivery: <input type="checkbox"/> Electronic - free w/ ACH/CC <input checked="" type="checkbox"/> Mail Invoice - \$2.95/month
Billing Address <u>3304 Gallatin Rd.</u>			
City <u>Nashville</u>	Stat <u>TN</u>	Zip <u>37216</u>	
Physical Address <u>Smev</u>			
City	Stat	Zip	
BTN <u>615-262-2300</u>	County <u>Davidson</u>		
Contact Name <u>Bill Sinks</u>	1 st Contact # <u>615-824-6680</u>		
Fax # <u>615-227-6527</u>	2 nd Contact #		
Email <u>Billsinks@bluegrassbeverages.com</u>	Fed ID <u>62-1781019</u>		
If Corp, Owner's Name <u>Bill Sinks</u>	D&B/SS# <u>415-92-2858</u>		

Account Setup: ☒ Single Account ☐ Multi Account

If Multi Account, this account is:

☒ Parent ☐ Child - Billable ☐ Child - Non-Billable

If this account is child, list parent account number or parent account connection number:

Tax Exempt: ☐ Federal ☐ State (Include certificate)

Long Distance	Contract Term	Switched IntraLata Rate	Switched InterLata Rate	Dedicated IntraLata Rate	Dedicated InterLata Rate	Minimum Monthly Commitment
One Plus ^{2A, 3A}	<u>36 mo.</u>	<u>.065</u>	<u>.065</u>			
Toll Free ^{2A, 4B}						
Calling Card ^{2A}		Calling Card Rate			Number of Cards	
VOICE ^{2A}		VOICE Recurring	Per Min. Rate		Number of Access Lines	

Local	Contract Term	Non Recurring	Recurring
<input checked="" type="checkbox"/> Superlink ^{2A, 2B} <input type="checkbox"/> Superlink Plus ^{3A, 3C} Number of Lines <u>3</u>	<u>36 mo.</u>		
Inside Wiring. CCC provide <input type="checkbox"/> Yes <input type="checkbox"/> No			
Equipment ^{5A} <input type="checkbox"/> Rent <input type="checkbox"/> Buy			

Internet	Contract Term	Non Recurring	Recurring
Web/Application Hosting ^{7A}			
Internet Access ^{7A} <input type="checkbox"/> POTS <input type="checkbox"/> ISDN <input type="checkbox"/> T1 (Bandwidth <u>CIR</u>)			
CleanMail ^{7B} <input type="checkbox"/> Virus Filtering <input type="checkbox"/> Spam Filtering			
Equipment ^{9A} <input type="checkbox"/> Rent <input type="checkbox"/> Buy			

Voice Mail	Contract Term	Non Recurring	Recurring
Number of Voice Mail Boxes <u>2A</u> Transfer Mailbox: <input type="checkbox"/> Yes <input type="checkbox"/> No			

Private Lines	Contract Term	Non Recurring	Recurring
Circuit ^{10, 1C} <input type="checkbox"/> T1 <input type="checkbox"/> 64K <input type="checkbox"/> 56K <input type="checkbox"/> Other <u>DCS</u> : <input type="checkbox"/> Yes <input type="checkbox"/> No			
Equipment ^{1A} <input type="checkbox"/> Rent <input type="checkbox"/> Buy			

How did you hear about us? If word of mouth, who referred you?

Sales Rep Name <u>STEVE BAKER</u>	BillPlex ID <u>1887</u>	<input checked="" type="checkbox"/> direct <input type="checkbox"/> agent <input type="checkbox"/> reseller <input type="checkbox"/> house
Account Manager	Sales Engineer	

Letter of Agency

Revised 10-19-01

Customer hereby appoints Cinergy Communications Company ("CCC") as agent in all matters relating to Customer's long distance and/or local service, to the extent those services are selected by Customer as indicated above. CCC is authorized to contact Customer's local telephone company to activate this service immediately. Customer understands that it may designate only one long distance carrier per telephone line. Customer agrees to pay all charges incurred on this account, including Internet access, local, long distance, toll free and calling card calls, taxes, tax-like charges, other surcharges, all FCC imposed or authorized charges and charges for access and access related charges. Customer is authorized to execute this agreement and acknowledges by signature that Customer has read, understands and agrees with all the terms and conditions contained within this Agreement. Customer agrees to the terms and conditions contained on the reverse side of this Agreement, as well as CCC's tariffs which may be modified by CCC from time to time and thereby affect the services furnished to Customer. The terms and conditions set forth in such tariffs shall supplement or, to the extent inconsistent, supersede the terms and conditions of this Agreement. Customer understands CCC may use a credit-reporting agency.

I HAVE READ AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS AGREEMENT.

Print Customer Name William R Sinks Jr. Signature [Signature]
 If Business, Title of Signer General Partner Date 4/17/02

Cinergy Communications Company
Communication Services Agreement – Terms and Conditions

- 1 **Payment and Billing.**
 - a. Customer is responsible for payment of all charges for services furnished to Customer hereunder.
 - b. Monthly charges shall be due and payable by Customer upon receipt of Cinergy Communications Company's ("CCC") invoice. ACH customers will be debited 15 days following the mailing or emailing of an invoice. Credit Card customers will be charged within 24 hours following the mailing or emailing of an invoice. Payment shall be made to CCC at the address set forth on the invoice. All charges and amounts payable hereunder shall be payable without set-off or abatement. Any disputes must be communicated to CCC in writing within fifteen (15) days of receipt of CCC's invoice and submitted with full payment. If a credit is determined to be warranted, CCC will issue the credit to Customer on a subsequent invoice.
 - c. A late payment charge of .05% per day (.1% per day in Indiana), not to exceed the highest rate allowed by law, shall be charged on any amount not paid within twenty-one (21) days of the invoice date.
 - d. Taxes, tax-like charges and other local, state or federally charged, imposed or authorized fees, charges and surcharges are not built into CCC's rates, and therefore, will be included on Customer's invoice. Customer agrees to pay all such amounts.
 - e. CCC reserves the right to require payment of a security deposit at any time, to secure payment of Customer's charges, which deposit shall be returned to Customer in full within thirty (30) days of the termination of this Agreement, subject to Customer making full and final payment for all charges incurred hereunder.
 - f. A \$25.00 service charge shall be added to all returned checks and all items submitted for direct payment (ACH) for which there is insufficient funds.
 - g. In the event Customer fails to pay all amounts which become due, including sums due under section 6, Customer, in addition to all other payments due to CCC hereunder, agrees to pay all costs associated with the collection of past due amounts, including court costs, collection agency fees, attorney fees and other costs.
- 2 **Enforceability.** This Agreement is not valid and enforceable unless accepted and/or provisioned by CCC.
3. **Term.** The initial term shall be as indicated on Form 1A. Upon the expiration of the initial term, this Agreement shall be renewed upon the same terms and conditions for successive twelve (12) month terms without further action by the parties, but may be terminated at the end of any twelve (12) month period by either of the parties hereto by the delivery of written notice not less than thirty (30) days prior to the expiration of any twelve (12) month period.
4. **Satisfaction Guarantee.** If, within ninety (90) days from the date of execution of this Agreement, Customer is not completely satisfied with the service level provided by Cinergy Communications Company in accordance with this Agreement, including notice and opportunity to cure, Customer may terminate and CCC will switch Customer back to the former carrier, upon written request, at no cost to Customer.
5. **Termination by CCC.** Notwithstanding anything to the contrary contained in this Agreement, CCC may discontinue services or terminate this Agreement for any of the following reasons: (i) Customer fails to pay any invoice within twenty-one (21) days from the due date of such invoice, provided CCC gives Customer notice and an opportunity to cure its payment default within three (3) business days of such notice; (ii) Regulatory or other governmental actions which adversely affect the cost of providing service; (iii) Customer furnishes false or misleading customer information; or (iv) Customer fails, in CCC's sole discretion, to maintain satisfactory credit qualifications.
6. **Termination by Customer.** Customer shall have the right to terminate this Agreement if CCC is in material breach of any condition and fails to cure such material breach within seven (7) business days of receipt of written notice thereof. In the event Customer terminates this Agreement prior to its expiration, other than as a result of CCC's material breach, or CCC terminates this Agreement for Customer's breach (including nonpayment), Customer agrees to pay CCC as liquidated damages a termination charge calculated as follows: sixty percent (60%) of Customer's average monthly charges hereunder multiplied by the number of months remaining in the term. Customer expressly acknowledges that in the event of an unauthorized termination of this Agreement, the anticipated loss to CCC in such event is estimated to be the amount set forth in the foregoing termination charge provision and such estimated value is reasonable and is not imposed as a penalty.
7. **Limitation of Liability.** CCC MAKES NO WARRANTIES, EITHER EXPRESS, IMPLIED OR STATUTORY, REGARDING THE SERVICES PROVIDED HEREUNDER, AND EXPRESSLY DISCLAIMS ALL WARRANTIES, INCLUDING WITHOUT LIMITATION, THOSE OF NONINFRINGEMENT, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE. CUSTOMER AGREES THAT DAMAGES ARISING HEREUNDER SHALL BE LIMITED TO THE AMOUNT ACTUALLY PAID BY CUSTOMER FOR SERVICES AND IN NO EVENT SHALL CCC BE LIABLE TO CUSTOMER FOR DAMAGES OF ANY KIND INCLUDING INCIDENTAL, CONSEQUENTIAL, INDIRECT, DIRECT, SPECIAL OR PUNITIVE DAMAGES.
8. **Adjustments.** During the term of this Agreement CCC may, for regulatory reasons which adversely affect the cost of providing service, increase the rates charged to Customer hereunder or delete or modify services provided hereunder or pass through to Customer all, or a portion of, any charges or surcharges directly or indirectly related to such regulatory activity. If a rate increase is instituted by CCC for other than regulatory reasons, Customer may terminate without penalty if CCC receives written notice of termination within thirty (30) days of the date that the rate increase takes effect. All services added by Customer during the term of this Agreement shall be incorporated into this Agreement and become subject to these Terms and Conditions.
9. **Minimum Monthly Commitment.** Customer agrees to the Minimum Monthly Commitment indicated on Form 1A, if applicable. Customer commits that the number of minutes it incurs during each monthly billing cycle will equal or exceed the amount of the commitment. If Customer fails to meet the minimum number of minutes in a month, then Customer will pay a Shortfall Charge equal to the difference in the number of minutes in this commitment and the number of minutes actually incurred multiplied by the per minute rate indicated.
- 10 **General.** This Agreement represents the entire understanding and agreement between the parties hereto and supersedes any and all prior agreements, whether written or oral, that may exist between the parties. No change, alteration or amendment of the terms or conditions of this Agreement are authorized or effective unless they have been agreed to in writing by an officer of CCC. This Agreement is a legally binding contract on the part of both CCC and Customer and shall remain binding and inure to the benefit of their respective principals, successors in interest, and assigns in accordance with the Terms and Conditions.

Customer Initials 

Bowling Green, KY: 1148 College Street, 270.842.8227 • Clarksville, TN: 1788 Wilma Rudolph Blvd, 931.653.0024
 Evansville, IN: 1419 W Lloyd Expressway, 812.464.8964 • Hendersonville, TN: 394 West Main, #B14, 615.264.4592
 Hopkinsville, KY: 204 East Ninth Street, 270.887.9724 • Louisville, KY: 200 High Rise Drive, #373, 502.400.6200
 Madisonville, KY: 54 W. Lake Street, 270.821.7868 • Owensboro, KY: 1001 Frederica Street, 270.685.1822
 Paducah, KY: 1315 Broadway, 270.443.6302

BillPlex WebWizard CSR Lookup

Page 1 of 4

BillPlex WebWizard

USER: sbaker (qcc1)

Main Menu :: Provisioning :: CSR Lookup

Data for 615 262-2300

(new_query)

- Products and Services
- Customer Service Record - SERVICE AND EQUIP
- Customer Service Record - DIR/TFC/BILL
- Customer Service Record - HUNTING LIST

Products and Services

[\(return to top\)](#)

Transaction Successful. (0239)

615 262 2300 110

SINKERS WINE &
SPIRITS
3304 GALLATIN PKE
NASHVILLE, TN 37216 3012

Number Item ***** BELLSOUTH *****

1	ADL11 -ADSL Virtual Circuit with Data Rates up to 1.5 Mbps
2	CREX4 -Custom Toll Restriction
4	FUJMX -Federal Universal Service Charge
2	HTG -Hunting/Rollover Service
4	LNPCX -FCC Local Number Portability Line Charge - Line
1	RJ21X -Jack-network interface, 25 line connector
1	SBLFX -Back-Up Line ?
4	TTB -Touch-Tone
3	1FB -Business Line
4	9ZR -FCC Charge for Network Access

Customer Service Record - SERVICE AND EQUIP

[\(return to top\)](#)

All data available for this CSR has been displayed. (9010)

---S&E

HTG A 2300, 2490

(LINES & STATIONS)

1 SBLFX Back-Up Line
TN 615 227-0083/PIC 0288
/LPIC 5124/PCA CM, 05-05-01

BillPlex WebWizard CSR Lookup

Page 2 of 4

/ZNB/ZSER 3C10000001
/LPCA DF, 02-08-99

1 TTB Touch-Tone
/TN 615 227-0083/SED 02-06-98
/ZSER 4310000002

1 FUJMX Federal Universal Service Charge
/TN 615 227-0083/SED 07-01-00
/ZSER 6510000016

1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 227-0083/SED 05-15-99
/ZSER 4910000012

1 9ZR FCC Charge for Network Access
/TN 615 227-0083/SED 02-06-98
/ZSER 4A10000003

1 1FB Business Line
/TN 615 227-6527/PIC 0222 — moved to
/LPIC 0222/PCA GB, 06-21-01 separate CSR
/ZNB/ZSER 5110000004 with DSL service.
/LPCA GB, 06-21-01

1 TTB Touch-Tone
/TN 615 227-6527/SED 02-06-98
/ZSER 5810000005

1 FUJMX Federal Universal Service Charge
/TN 615 227-6527/SED 07-01-00
/ZSER 6C10000017

1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 227-6527/SED 05-15-99
/ZSER 5010000013

1 9ZR FCC Charge for Network Access
/TN 615 227-6527/SED 02-06-98
/ZSER 5F10000006

1 1FB Business Line
/TN 615 262-2300/PIC 0222
/LPIC 0222/HTG A
/PCA GB, 06-18-01/ZNB
/ZSER 6610000007
/LPCA GB, 06-18-01/GF ADSL
/PSM .ARDT/SSM/TTRA 615 226
/EXK 615 226/LRN 6152260000

1 TTB Touch-Tone
/TN 615 262-2300/SED 02-06-98
/ZSER 6D10000008

1 ADL11 ADSL Virtual Circuit with Data Rates up to 1.5 Mbps Downstream and up to
/TN 615 262-2300 ADSL service being moved to 615-227-6527
/RCID T4.HFGJ.702653..sc
/VPI 13, VCI 990
/RVPI 8, RVC1 35
/WW 901 M71-2484/SED 09-17-01
/ZSER 811000001A

1 CREX4 Custom Toll Restriction
/TN 615 262-2300/CBK A
/SED 02-06-98/ZSER 7410000009

1 FUJMX Federal Universal Service Charge
/TN 615 262-2300/SED 07-01-00
/ZSER 7310000018

1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 262-2300/SED 05-15-99
/ZSER 5710000014

1 9ZR FCC Charge for Network Access
/TN 615 262-2300/SED 02-06-98

BillPlex WebWizard CSR Lookup

Page 3 of 4

/ZSER 7B1000000A
2 HTG Hunting/Rollover Service
/SED 02-06-98/ZSER 821000000B
1 RJ21X Jack-network interface, 25 line connector
/NIJ/SED 02-13-98
/ZSER 891000000C
1 1FB ~~Business Line~~ ✓
/TN 615 262-2490/PIC 0222
/LPIC 0222/HTG A
/PCA GB, 06-21-01/ZNB
/ZSER 901000000D
/LPCA GB, 06-21-01
1 TTB Touch-Tone
/TN 615 262-2490/SED 02-06-98
/ZSER 971000000E
1 CREX4 Custom Toll Restriction
/TN 615 262-2490/CBK A
/SED 02-06-98/ZSER 9E1000000F
1 FUJMX Federal Universal Service Charge
/TN 615 262-2490/SED 07-01-00
/ZSER 7A10000019
1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 262-2490/SED 05-15-99
/ZSER 5E10000015
1 9ZR FCC Charge for Network Access
/TN 615 262-2490/SED 02-06-98
/ZSER 3B10000010

Customer Service Record - DIR/TFC/BILL

(return to top)

All data available for this CSR has been displayed. (9010)

---DIR

DDA BA
DEL A1, B1

---BILL

BN1 SINKERS WINE &
BN2 SPIRITS
BA3 3304 GALLATIN PKE
PO NASHVILLE TN 37216

Customer Service Record - HUNTING LIST

(return to top)

All data available for this CSR has been displayed. (9010)

HTG A 2300, 2490
2 HTG Hunting/Rollover Service

BillPlex WebWizard CSR Lookup

Page 4 of 4

/SED 02-06-98/ZSER 821000000B

BillPlex WebWizard CSR Lookup

Page 1 of 3

BillPlex WebWizard

USER: sbaker (qcc1)

Main Menu :: Provisioning :: CSR Lookup

Data for 615 227-6527

(new query)

- Products and Services
- Customer Service Record

Products and Services

(return to top)

Transaction Successful. (0239)

*NEW CSR AFTER
SPLIT*

615 227 6527 111

SINKERS WINE &
SPIRITS
3304 GALLATIN PKE
NASHVILLE, TN 37216

Number	Item	***** BELLSOUTH *****
1	ADL11	-ADSL Virtual Circuit with Data Rates up to 1.5 Mbps
1	FUJMX	-Federal Universal Service Charge
1	LNPCX	-FCC Local Number Portability Line Charge - Line
1	NP3	-Listing-not in directory or directory assistance
1	TTB	-Touch-Tone
1	1FB	-Business Line
1	92R	-FCC Charge for Network Access

Customer Service Record

(return to top)

All data available for this CSR has been displayed. (9010)

ACCT 615 227-6527 111

EXCH NVE
BCS 1FB
STAT OPEN
TYPE BUSINESS
SVCC 21
EQIND1 7
LASTZSER 268435457
MULTLINE 1
HTGHMLCT 0
JOINTIND
JAZZIND
BREFIND

BillPlex WebWizard CSR Lookup

Page 2 of 3

DENYIND 0
BMIHTIND
SENSACCT
TTRA 615 226
CENT S20

---LIST

NP (NON-PUB) SINKERS; WINE &
SPIRITS
LA 3304 GALLATIN RD
SA 3304 GALLATIN PKE, NASHVILLE
DZIP 37216
YPH 999001
NONE
SIC 5182

---DIR

DEL A0, B0

---BILL

BN1 SINKERS WINE &
BN2 SPIRITS
BA3 3304 GALLATIN PKE
PO NASHVILLE TN 37216

---S&E

(CHARGEABLE LISTINGS)

1 NP3 Listing-not in directory or directory assistance
/SED 05-10-02/ZSER 3C10000001

(LINES & STATIONS)

1 1FB Business Line
/TN 615 227-6527/PIC 0222
/LPIC 0222/PCA GB, 06-21-01
/ZNB/ZSER 5110000004
/LPCA GB, 06-21-01/GF ADSL
/PSM .ARDT/SSM/TTRA 615 226
/EXK 615 226/LRN 6152260000
/SED 05-10-02
1 TTB Touch-Tone
/TN 615 227-6527/SED 05-10-02
/ZSER 5810000005
1 ADL11 ADSL Virtual Circuit with Data Rates up to 1.5 Mbps Downstream and up to
/TN 615 227-6527
/RCID T4.HFGJ.696470..SC
/VPI 14, VCI 731
/RVPI 8, RVCI 35
/WW 901 M71-2484/SED 05-10-02
/ZSER 881000001B
1 FUJMX Federal Universal Service Charge
/TN 615 227-6527/SED 05-10-02
/ZSER 6C10000017
1 LNPCX FCC Local Number Portability Line Charge - Line

BillPlex WebWizard CSR Lookup

Page 3 of 3

1 9ZR /TN 615 227-6527/SED 05-10-02
/ZSER 5010000013
FCC Charge for Network Access
/TN 615 227-6527/SED 05-10-02
/ZSER 5F10000006

BillPlex WebWizard CSR Lookup

Page 1 of 4

BillPlex WebWizard

USER: sbaker (qcc1)

Main Menu :: Provisioning :: CSR Lookup

Data for 615 262-2300

(new query)

- Products and Services
- Customer Service Record - SERVICE AND EQUIP
- Customer Service Record - DIR/TFC/BILL
- Customer Service Record - HUNTING LIST
- Customer Service Record - IDENT/LIST

Products and Services

(return to top)

Transaction Successful. (0239)

615 262 2300 110

*NEW w/ DSL
FINALLY REMOVED*

SINKERS WINE &
SPIRITS
3304 GALLATIN PKE
NASHVILLE, TN 37216 3012

Number	Item	***** BELLSOUTH *****
2	CREX4 -Custom Toll Restriction	
3	FUJMX -Federal Universal Service Charge	
2	HTG -Hunting/Rollover Service	
3	LNPCX -FCC Local Number Portability Line Charge - Line	
1	RJ21X -Jack-network interface, 25 line connector	
1	SBLFX -Back-Up Line	
3	TTB -Touch-Tone	
2	1FB -Business Line	
3	9ZR -FCC Charge for Network Access	

Customer Service Record - SERVICE AND EQUIP

(return to top)

All data available for this CSR has been displayed. (9010)

---S&E

HTG A 2300, 2490

(LINES & STATIONS)

1 SBLFX Back-Up Line
/TN 615 227-0083/PIC 0288
/LPIC 5124/PCA CM, 05-05-01

BillPlex WebWizard CSR Lookup

Page 2 of 4

/ZNB/ZSER 3C10000001
/LPCA DF, 02-08-99
1 TTB Touch-Tone
/TN 615 227-0083/SED 02-06-98
/ZSER 4310000002
1 FUJMX Federal Universal Service Charge
/TN 615 227-0083/SED 07-01-00
/ZSER 6510000016
1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 227-0083/SED 05-15-99
/ZSER 4910000012
1 9ZR FCC Charge for Network Access
/TN 615 227-0083/SED 02-06-98
/ZSER 4A10000003
1 1FB Business Line
/TN 615 262-2300/PIC 0222
/LPIC 0222/HTG A
/PCA GB, 06-18-01/ZNB
/ZSER 6610000007
/LPCA GB, 06-18-01
/TTRA 615 226/EXK 615 226
/LRN 6152260000
1 TTB Touch-Tone
/TN 615 262-2300/SED 02-06-98
/ZSER 6D10000008
1 CREX4 Custom Toll Restriction
/TN 615 262-2300/CBK A
/SED 02-06-98/ZSER 7410000009
1 FUJMX Federal Universal Service Charge
/TN 615 262-2300/SED 07-01-00
/ZSER 7310000018
1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 262-2300/SED 05-15-99
/ZSER 5710000014
1 9ZR FCC Charge for Network Access
/TN 615 262-2300/SED 02-06-98
/ZSER 7B1000000A
2 HTG Hunting/Rollover Service
/SED 02-06-98/ZSER 821000000B
1 RJ21X Jack-network interface, 25 line connector
/NIJ/SED 02-13-98
/ZSER 891000000C
1 1FB Business Line
/TN 615 262-2490/PIC 0222
/LPIC 0222/HTG A
/PCA GB, 06-21-01/ZNB
/ZSER 901000000D
/LPCA GB, 06-21-01
1 TTB Touch-Tone
/TN 615 262-2490/SED 02-06-98
/ZSER 971000000E
1 CREX4 Custom Toll Restriction
/TN 615 262-2490/CBK A
/SED 02-06-98/ZSER 9E1000000F
1 FUJMX Federal Universal Service Charge
/TN 615 262-2490/SED 07-01-00
/ZSER 7A10000019
1 LNPCX FCC Local Number Portability Line Charge - Line
/TN 615 262-2490/SED 05-15-99
/ZSER 5E10000015

1 9ZR FCC Charge for Network Access
/TN 615 262-2490/SED 02-06-98
/ZSER 3B10000010

Customer Service Record - DIR/TFC/BILL

(return to top)

All data available for this CSR has been displayed. (9010)

---DIR

DDA BA
DEL A3, B3

---BILL

BN1 SINKERS WINE &
BN2 SPIRITS
BA3 3304 GALLATIN PKE
PO NASHVILLE TN 37216

Customer Service Record - HUNTING LIST

(return to top)

All data available for this CSR has been displayed. (9010)

HTG A 2300, 2490
2 HTG Hunting/Rollover Service
/SED 02-06-98/ZSER 821000000B

Customer Service Record - IDENT/LIST

(return to top)

All data available for this CSR has been displayed. (9010)

ACCT 615 262-2300 110

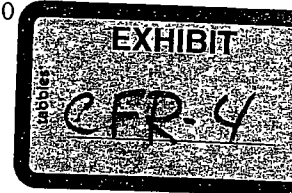
EXCH NVE
BCS 1FB
STAT OPEN
TYPE BUSINESS
SVCC 21
EQIND1 20
LASTZSER 268435483
DISCDATE
MULTLINE 3
HTGHMLCT 1
JOINTIND
JAZZIND

BREFIND
DENYIND 0
BMITIND
SENSACCT 0
TTRA 615 226
CENT S20

---LIST

LN SINKERS; WINE & SPIRITS
LA 3304 GALLATIN RD
SA 3304 GALLATIN PKE
, NASHVILLE
DZIP 37216
YPH 999001
NONE
SIC 5182
ZAEC XXXXX

Cinergy Communications Company
8 Bond Street
Overland Park, KS 66214
phone 913.492.1230
fax 913.492.1684



June 25, 2002

CINERGY.
COMMUNICATIONS

VIA FEDERAL EXPRESS

Mr. Darrell Gore
Gore Communications
624 Woodland Mills Rd.
P.O. Box 73
Union City, TN 38281

RE: CEASE AND DESIST

Dear Mr. Gore:

It has come to my attention that your company has engaged in willful and deliberate conduct intended to disrupt the business of Cinergy Communications. Up until now, Gore Communications may have believed that it was the only game in town. Perhaps due to the close relationship with the local Bell monopoly, BellSouth, Gore Communications believed that it was entitled to business in its territory. However, this is to advise you that pursuant to the Telecommunications Act of 1996 you now have competition.

It is my understanding that you are defaming the good name of Cinergy Communications to numerous customers and potential customers in and around Union City, Tennessee. I have reports that Cinergy recently lost a 115 line customer because your employees told the Chamber of Commerce that Cinergy was taking away local jobs.

I also have reports from Top of the World Distributors that Mr. Gore made several negative comments about Cinergy Communications. I understand that last Friday this customer was having problems with dropped calls which your company blamed on Cinergy. After it was confirmed with BellSouth that the problem was in the system, Mr. Gore proceeded to blame the problem on the long distance carrier, Cinergy Communications. This customer requested that Mr. Gore come take a look at the phone system and Mr. Gore told the customer a repair would require a 4 hour service outage. However, Brad Gore came out to look at the system and was able to fix this problem in ten (10) minutes.

I also have a report that Mr. Gore was telling WENK Radio in Union City, TN that Cinergy is just a company with a computer and BellSouth is the "big dog."

Finally, I have a report from Royster-Clark in Union City, TN. Cinergy Communications had PIC'd that company's long distance to MCI per the agreement with Cinergy. However, it is my understanding that Gore Communications had the auto-dialer route the calls to an AT&T operator. This was an intentional attempt by Gore Communications to make Cinergy Communications look bad. Furthermore, this is illegal slamming activity in violation of FCC law.

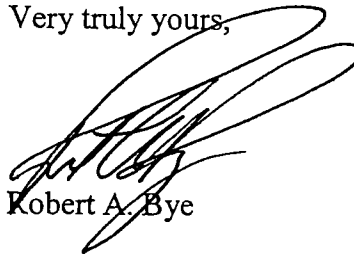
This is just a sample of the complaints I have received for which there are witnesses. There are several other allegations that could be proved if necessary. This is to advise you that I am not amused by the antics of your company. We will be keeping a close watch on Gore Communications and any further illegal actions will result in an action for defamation, slamming, tortuous interference with a contractual relationship, and for violations of T.C.A. 47-50-109 which provides:

It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring suit for the breach and for such damages.

This above language means that you will pay three times our losses for every customer we can prove breached our contract because of your company's actions. We already have 115 lines established. I seriously doubt that you can afford any further mischief. Also, as an agent of BellSouth, BellSouth may be responsible for your actions. By copy of this letter to BellSouth, I am demanding that BellSouth control its agent and respond back to me.

If you have any questions, please do not hesitate to give me a call. Otherwise, I will assume that you have decided to conduct yourself in an appropriate and professional manner.

Very truly yours,



Robert A. Bye

Vice President and
General Counsel

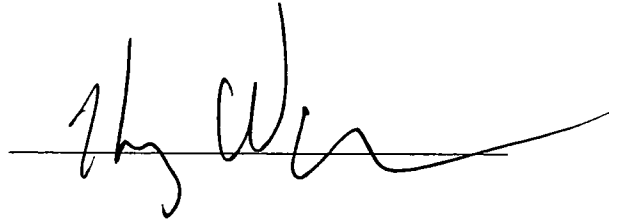
cc: Leah Cooper, BellSouth Telecommunications, Inc.
John Johnson, Vice President Marketing and Sales
Laura Jane Walsh, Sales Manager

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 9th day of July, 2002.

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

Bob Bye, Esq.
Cnergy Communications
8829 Bond St.
Overland Park, KW 66214

A handwritten signature in black ink, appearing to read "Guy Hicks", is written over a horizontal line.